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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF T.C.U.), *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether district court jurisdiction over a union's claim that a railroad violated the exclusive representation principle of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, by dealing directly with represented employees over matters which are subject to collective bargaining, can be defeated by the railroad's claim that the union has arguably waived the employees' representation rights by not challenging prior instances of direct dealing over such matters?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Santa Fe's Employee Buyout Program	3
B. Court Proceedings	4
REASONS FOR GRANTING THE WRIT	8
I. DISMISSAL OF THE UNIONS' COMPLAINT IS CONTRARY TO A SUBSTANTIAL BODY OF PRECEDENT OF THIS COURT REGARDING THE IMPORTANCE OF THE EXCLUSIVE REPRESENTATION PRINCIPLE, THE NECESSITY FOR DISTRICT COURT ENFORCEMENT OF THAT PRINCIPLE AND THE WAIVER OF STATUTORY RIGHTS OF EMPLOYEES	9
A. The Court Of Appeals' Decision Is At Odds With Precedent Of This Court Holding That The Exclusive Representation Principle And District Court Enforcement Of That Principle Are Essential To Proper Functioning Of The Railway Labor Act	9

TABLE OF CONTENTS—Continued

Page

B. The Court Of Appeals' Decision That A Carrier's Merely Arguable Claim Of Waiver Of The Prohibition Against Direct Dealing Can Defeat District Court Jurisdiction Of A Claim Under The Exclusive Representation Principle Is At Odds With Precedent Of This Court Regarding Waivers Of Statutory Rights 14

C. Even If Santa Fe's Waiver Argument Necessitated Arbitration, Dismissal Of The Unions' Complaint Was Contrary To This Court's Decision In *Conrail v. RLEA* 22

II. GENERAL ADOPTION OF THE COURT OF APPEALS' REASONING WILL SUBSTANTIALLY UNDERMINE OPERATION OF THE STATUTE 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES RELIED UPON: Page

Alexander v. Gardner-Denver, 415 U.S. 36 (1974) 24
American Railway and Airway Supervisors Association v. Soo Line Railroad, 891 F.2d 675 (8th Cir. 1989) 17, 18
AT&T Technologies, Inc. v. Communication Workers of America, 574 U.S. 653 (1986) 20, 24
Brotherhood of Railway and Airline Clerks v. Atchison, Topeka & Santa Fe Ry. Co., 847 F.2d 403 (7th Cir. 1988) 6, 27
Carey v. Westinghouse, 375 U.S. 261 (1964) 24
Consolidated Rail Corp. v. Railway Labor Executives' Association, —— U.S. —— 105 L.Ed.2d 250 (1989) ..... *passim*
Detroit and Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142 (1969) 23
Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945) 5
Emporium Capwell Co. v. Western Addition Community Organizations, 420 U.S. 50 (1975) 9
Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) 13
Heinz v. NLRB, 311 U.S. 514 (1940) 16
International Association of Machinists and Aerospace Workers District Lodge No. 19 v. Soo Line R.R. Co., 850 F.2d 368 (8th Cir. 1988) 27
J.I. Case v. NLRB, 321 U.S. 332 (1944) ..... *passim*
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 12, 13, 15
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) ..... *passim*
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) 10
NLRB v. Magnavox Co., 415 U.S. 322 (1974) 16
Order of Railroad Conductors v. Pitney, 326 U.S. 561 (1946) 23
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Slocum v. Delaware, L & W RR., 399 U.S. 239 (1950) 20, 24
Steele v. Louisville & Nashville RR, 323 U.S. 192 (1944) 5, 14
Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1947) 10
Texas & N.O.R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548 (1930) ..... *passim*
United Steelworkers of America v. Engerprise Wheel and Car Corp., 363 U.S. 593 (1960) 24
United Technologies Corporation, 268 NLRB No. 83 (1984) 24
Virginian Ry. Co. v. System Federation No. 40 Railway Employees Department, AFL, 300 U.S. 515 (1937) ..... *passim*

STATUTES AND OTHER AUTHORITIES:

National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 6
Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*
Section 2 First, 45 U.S.C. § 152 First 2, 4
Section 2 Third, 45 U.S.C. § 152 Third ..... *passim*
Section 2 Fourth, 45 U.S.C. § 152 Fourth ..... *passim*
Section 2 Fifth, 45 U.S.C. § 152 Fifth 16
Section 2 Eighth, 45 U.S.C. § 152 Eighth 2, 16
Section 2 Ninth, 45 U.S.C. § 152 Ninth 2, 26
Section 3 First, 45 U.S.C. § 153 First 2
Section 6, 45 U.S.C. § 156 ..... *passim*
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(c) 2
28 U.S.C. § 1331 3
28 U.S.C. § 1337 3

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ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners [1] respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 28, 1990 in *Brotherhood of Railway Carmen (Division of T.C.U.), et al. v. Atchi-*

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[1] Brotherhood of Railway Carmen (Division of TCU), International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers and Blacksmiths, International Brotherhood of Electrical Workers, Sheet Metal Workers' International Association and the International Brotherhood of Firemen and Oilers are labor organizations which represent railroad "shopcraft" employees throughout the United States. Petitioners are collectively referred to herein as the "Unions".

son, Topeka & Santa Fe Railway Company, 894 F.2d 1463 (5th Cir. 1990).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 894 F.2d 1463 and is reprinted as Appendix A hereto at 1a-13a. The ruling of the United States District Court for the Northern District of Texas is reported at 703 F. Supp. 597 and is reprinted as Appendix B hereto at 14a-23a.

JURISDICTION

The court of appeals' decision was entered on February 28, 1990. Petitioner asked this Court to extend the time in which to file this petition, and on May 22, 1990, that time was extended by Justice White to and including June 28, 1990. Sup. Ct. No. A-828. That extension, totaling thirty (30) days, is within the time period authorized by 28 U.S.C. § 2101(c), and this petition has been filed within that extended time period. Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of various provisions of the Railway Labor Act ("RLA"), including the duty to bargain established by Section 2 First of the RLA, 45 U.S.C. § 152 First, and the fundamental principle of the RLA that the duly designated representative of a craft or class of employees is the exclusive representative of all employees in that craft or class. That principle is expressed in Sections 2 Third, Fourth, and Ninth of the Act, 45 U.S.C. §§ 152 Third, Fourth and Ninth. Sections 2 Eighth, 3 First and 6 of the Act, 45 U.S.C. §§ 152 Eighth, 153 First and 156 are also relevant. Those statutory provisions have been reproduced in the appendix to this petition as Appendix C at 26a-29a.

STATEMENT OF THE CASE

The Unions are the duly designated bargaining representatives of employees of respondent Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") who work in Santa Fe's shops performing maintenance and repair work on locomotives and rail cars. Appendix A at 1a; Appendix B at 14a-15a. The underlying complaint was brought by the Unions in response to Santa Fe's unilateral implementation of a program in which it solicited compensated resignations of shopcraft employees in return for their relinquishment of all employment rights, including collectively bargained rights. The Unions' complaint sought enforcement of one of the essential principles of the ("RLA"), *i.e.*, the "affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other". *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937). As this Court observed in *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930):

> . . . the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained.

The Unions invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337 to enforce the RLA's exclusive representation principle; they now seek this Court's review of the court of appeals' decision that the district court lacked jurisdiction of their complaint to enforce this fundamental statutory command.

A. Santa Fe's Employee Buyout Program

In December 1987, four months after it began furloughs of employees at its Cleburne, Texas shops, Santa Fe announced a so-called "voluntary resignation program" under which it would "buyout" a limited number

of employees on a "first come, first served basis". In return for $20,000, such employees would be required to waive all claims and rights under applicable collective bargaining agreements, as well as any other claims against Santa Fe. Appendix A at 2a. Upon learning of the buyouts, the Unions immediately protested Santa Fe's program, asserting that it constituted direct dealing with employees who had designated those Unions as their collective bargaining representatives, in violation of Section 2 Third and Fourth of the RLA, 45 U.S.C. § 152 Third and Fourth. Appendix B at 26a-27a. However, because of the furloughs which preceded Santa Fe's solicitation of buyouts, "[e]mployees were, therefore, concerned about their job security, and many rushed to accept the buyout". Appendix A at 2a.

B. Court Proceedings

The Unions' complaint asserted that Santa Fe's program involved matters relating to rates of pay, rules and working conditions which are subject to bargaining under Sections 2 First and 6 of the RLA (45 U.S.C. §§ 152 First and 156), as well as the relinquishment of previously collectively bargained rights. Accordingly, the Unions contended that Santa Fe was required by Section 2 Third of the RLA to negotiate over the terms of the buyout program exclusively through the duly designated collective bargaining representatives of its employees. Consequently, the Unions claimed that Santa Fe could not bargain directly with individual employees.[2]

Santa Fe sought dismissal of the Unions' complaint, asserting that a written agreement with all of the

[2] The Unions also asserted that the program constituted a unilateral change in an agreement applicable to closings of shop facilities and transfers of shop work in violation of Section 2 Seventh of the RLA (45 U.S.C. § 152 Seventh). The district court's dimissal of the Unions' cause of action under Section 2 Seventh was not appealed to the court of appeals. Appendix A at 2a.

Unions, and an alleged unwritten agreement, implied through asserted past practices, permitted Santa Fe to deal directly with individual workers to buyout their collectively bargained rights. The alleged unwritten agreement was implied by the recitation of several occurrences in which Santa Fe claimed to have engaged in similar direct dealings with shopcraft employees; specifically, buyouts of twenty (20) employees in virtually all of the crafts in 1984, buyouts of sixteen (16) electricians in 1987 and settlements of personal injury and employment discrimination claims. Appellee's Record Excerpts at 41-45. Santa Fe alleged that these transactions were accomplished with Union knowledge and acquiescence through the Unions' alleged failure to challenge those buyouts. Appendix A at 12a n.12; Appellee's Record Excerpts at 41-45. Therefore, Santa Fe contended that because it asserted an arguable claim to contractual authority for its direct dealing, under *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945), the case involved a "minor dispute", a dispute over interpretation application and enforcement of existing agreements, and was subject to the exclusive jurisdiction of the arbitration panels of the National Railroad Adjustment Board ("NRAB").

The district court agreed with Santa Fe's argument and dismissed the complaint. That court was unpersuaded by Santa Fe's reliance upon the written agreement with the Unions, because the agreement "does not address voluntary resignation programs of the type initiated by Defendant." Appendix B at 21a-22a (footnote omitted). However, the court found that Santa Fe's "claim that the voluntary resignation program was consistent with a mutually understood course of dealings between the parties was non-frivolous" and that "the dispute presented in this case was therefore minor and within the exclusive jurisdiction of the Arbitration Board". Appendix B at 22a-23a, *citing Brotherhood of*

Railway, Airline & Steamship Clerks v. Atchison, Topeka & Santa Fe Ry., 847 F.2d 403, 408 (7th Cir. 1988).

In the court of appeals, the Unions challenged the district court's conclusion that it lacked jurisdiction of their complaint as contrary to long-standing precedent of this Court, holding that because of the centrality of the exclusive representation principle to the operation of the RLA, the district courts have jurisdiction to enforce the requirements of Sections 2 Third, Fourth and Ninth.[3] The Unions asserted that Santa Fe's contention that the district court lacked jurisdiction of the complaint because of the railroad's claim of implied contractual authority for its actions, in reality constituted a claim by Santa Fe that the Unions, by their alleged silence with respect to two isolated instances of buyouts of small groups of employees, had waived the statutory rights of all of their members in the Santa Fe system to bargain over the terms of buyouts exclusively through their designated representatives. The Unions argued that the employees' right to collective representation was so fundamental to the RLA that it could not be waived. (Appendix A at 5a n.5.) Alternatively, the Unions' contended that if such waiver was possible, by analogy to precedent of this Court under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.; (see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)), such waiver would have to be "explicitly stated" and "clear and unmistakable".

Accordingly, the Unions claimed that the district court's abdication of jurisdiction over the Unions' complaint, based upon Santa Fe's merely "non-frivolous" assertion of an implied contract right inferred from an alleged past practice, was in conflict with a substantial

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[3] *Texas & New Orleans Railroad, supra; Virginian Railway, supra; Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

body of precedent of this Court. Appendix A at 7a-13a. Finally the Unions argued that even if Santa Fe's contractual defense to the Unions' statutory claim required arbitration, the complaint should not have been dismissed, rather the district court should have retained jurisdiction while deferring the contract interpretation issue to arbitration. Reply Brief for Petitioners at 22 n.12.[4]

The Fifth Circuit affirmed the district court's decision, concluding that under *Metropolitan Edison, supra,* representation rights can be waived; however, that Court found that the *Metropolitan Edison* requirement that a waiver of statutory rights be "clear and unmistakeable" was not necessarily applicable to the RLA. Appendix A at 5a n.5 and 11a n.9. The court of appeals agreed with the district court that Santa Fe's reliance upon its written agreement with the Unions was insubstantial, but that "the claims based on implied terms", derived from Santa Fe's assertions of past practices "do have some arguable basis sufficient to render this a minor dispute". Appendix A at 12a-13a. Therefore, the Fifth Circuit reasoned that under the RLA, Santa Fe's assertion of an "arguable" contractual claim that the Unions' impliedly waived the employees' RLA rights rendered the dispute "minor", within the exclusive jurisdiction of the NRAB and outside the jurisdiction of the district court. Appendix A at 13a, *citing, Conrail v. RLEA, supra.* The Fifth Circuit therefore affirmed the district court's dismissal of the Unions' complaint.[5]

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[4] *Citing Consolidated Rail Corporation v. Railway Labor Executives' Association,* 491 U.S. ——, 105 L.Ed.2d 250, 266 (1989) (*"Conrail v. RLEA"*).

[5] The court of appeals did not address the Unions' contention that under *Conrail v. RLEA,* the district court should not have dismissed the complaint but rather should have deferred Santa Fe's claim to arbitration while retaining jurisdiction of the Union's complaint pending the outcome of such arbitration.

REASONS FOR GRANTING THE WRIT

This case concerns a matter fundamental to the operation of the Railway Labor Act: The right of rail employees to designate exclusive representatives for bargaining with their employer railroads over rates of pay, rules and working conditions, and the concomitant duty of railroads to bargain only with such designated representatives, to the exclusion of even those employees themselves. As this Court explained in *Virginian Railway, supra*, the exclusive representation principle of the RLA "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." 300 U.S. at 548. Moreover, the Court has consistently recognized that the federal courts have jurisdiction to enforce the rights and obligations arising out of the exclusive representation principle. *Id.* at 547; *Texas & New Orleans R.R., supra*, 281 U.S. 569-570. The Unions submit that the court of appeals' conclusion that Santa Fe's assertion of a merely arguable claim of an implied agreement waiving the statutory prohibition against direct dealing with union-represented employees divested the district court of jurisdiction over the Unions' complaint seeking enforcement of that prohibition is inconsistent with precedent of this Court, is not supported by the rationale of *Conrail v. RLEA* upon which the court of appeals relied and substantially undermines effective operation of the RLA.

Moreover, given this Court's recognition of the fundamental importance of the exclusive representation principle and district court enforcement of the rights and obligations arising under that principle, the Unions submit that the prohibition against direct dealing cannot be waived. And even if that prohibition can be waived, the Unions submit that, in conformity with NLRA precedent (*Metropolitan Edison, supra*), such waiver cannot be found absent a showing of clear and convincing evidence. Accordingly, Santa Fe's assertion of a merely arguable

claim of waiver could not deprive the district court of jurisdiction over the Unions' complaint.

Because this case does not involve an isolated instance of railroad direct dealing with Union represented employees, because the facts of this case demonstrate the importance of the prohibition against direct dealing, and because of the importance of district court enforcement of the exclusive representation principle to effective operation of the RLA, the Unions respectfully submit that this Court should grant their petition in order to review the decision of the Court of Appeals for the Fifth Circuit.

I. DISMISSAL OF THE UNIONS' COMPLAINT IS CONTRARY TO A SUBSTANTIAL BODY OF PRECEDENT OF THIS COURT REGARDING THE IMPORTANCE OF THE EXCLUSIVE REPRESENTATION PRINCIPLE, THE NECESSITY FOR DISTRICT COURT ENFORCEMENT OF THAT PRINCIPLE AND THE WAIVER OF STATUTORY RIGHTS OF EMPLOYEES

A. The Court Of Appeals' Decision Is At Odds With Precedent Of This Court Holding That The Exclusive Representation Principle And District Court Enforcement Of That Principle Are Essential To Proper Functioning Of The Railway Labor Act

The exclusive representation principle is of paramount importance to the operation of the RLA and effectuation of the policies expressed in that statute because the RLA is not concerned with the actual terms of employment of railroad workers but rather is concerned with the establishment of collective bargaining exclusively through freely selected representatives as the method by which railroad workers can participate in the determination of their terms of employment. In *Emporium Capwell Co. v. Western Addition Community Organizations*, 420 U.S. 50 (1975), this Court stated that:

> "National Labor Policy has been built on the premise that by pooling their economic strength and act-

> ing through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees."

Id. at 63, *quoting NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). And in *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1947) the Court stated that:

> [t]he Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours or working conditions as such . . . . So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.

Thus, federal labor policy is addressed not to the promulgation of rules regarding rates of pay and working conditions, but to the recognition of the rights of workers to organize and bargain *collectively, and only collectively*, with employers and to the prohibition against employer frustration of that scheme through attempts to bargain individually with employees who have designated collective bargaining representatives. In essence, the federal labor laws are concerned only with a process through which employers and employees can establish rates of pay and working conditions rather than with the outcome of the process; to the extent that an employer undermines or circumvents that process, it undermines or circumvents the labor laws themselves.

Because of the centrality of the exclusive representation principle to the statutory scheme, this Court, early

in the histories of both the RLA and NLRA, forcefully held that an employer may not bypass the collective bargaining representative of its employees and attempt to make arrangements with individual employees concerning rates of pay and working conditions. Just several years after the enactment of the RLA, the Court held that the right of employees to designate representatives for collective bargaining and to bargain exclusively through those representatives was the heart of the statute; stating:

> Freedom of choice in the selection of representatives on each side of the dispute is the esential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained.

Texas & New Orleans R.R., supra, 281 U.S. 548, 569. And in 1937, the Court held that "the right of employees to organize and bargain collectively through the representative of their own selection is exclusive. It imposes the affirmative duty to treat only with the true representative hence the negative duty to treat with no other." *Virginian Railway, supra*, 300 U.S. at 548.

Then, in 1944, the Court issued several decisions under the RLA and the NLRA regarding the nature, scope and importance of the exclusive representation rights of employees who have designated a collective bargaining representative. In *J.I. Case v. NLRB*, 321 U.S. 342 (1944), the Court rejected an employer's contention that its preexisting contracts with individual employees precluded negotiations with a newly certified bargaining representative regarding matters addressed

by the individual contracts. The Court stated that a union contract is like a "trade agreement" which governs the terms of all employment relationships within its scope and while "[t]he employer, except as restricted by the collective bargaining agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge," the terms of employment are already established by the collective agreement and "[t]here is little left to individual agreement except the act of hiring." 321 U.S. at 335. Accordingly, the individual contract is "subsidiary to the terms of the trade agreement" and an individual employee may not "waive any of its benefits", even if on his own he would yield to less favorable terms." *Id.* at 336. In so holding the Court noted that "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *Id.* at 338.

In *Order of Railroad Telegraphers, supra,* the Court expressly stated that its holding in *J.I. Case* applied with equal force to the RLA (321 U.S. at 347) and held that collective bargaining agreements preclude operation of contracts entered by individual employees when a collective agreement is in effect; even when the individual contracts concern a situation not expressly addressed by the collective agreements. 321 U.S. at 344.

The Court then issued a more comprehensive decision in *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678 (1944), holding that an employer violated the NLRA when, at the request of a group of its employees, it negotiated directly with employees for a wage increase rather than negotiating a collective bargaining agreement with their union. The Court stated "[t]hat it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with indi-

vidual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in" *J.I. Case* and *Order of Railroad Telegraphers*. 321 U.S. at 684. The Court further noted that "[t]he statute guarantees to all employees the right to bargain collectively through their chosen representative. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent would be subversive of the mode of collective bargaining which the statute has ordained. . . ." *Id.* The Court explained that "orderly collective bargaining requires that the employer not be permitted to go behind the designated representatives in order to bargain with employees themselves, prior to [a formal] revocation" of bargaining authority. *Id.* at 685. The Court held that the employer in *Medo Photo* was not relieved of its obligations to negotiate only with the union, even when its employees asked that those obligations be disregarded, because "[t]he statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer even though the employees consent." *Id.* at 687. *See also Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949)—". . . the [RLA] which grants the majority exclusive representation for collective bargaining purposes strips minorities within the craft of all power of self protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own behalf." *Id.* at 238, *citing Order of Railroad Telegraphers, J.I. Case* and *Medo Photo.*

Because of the importance of the process of bargaining through exclusive collective representatives to the working of the RLA scheme, the Court has consistently recognized the crucial role of the federal courts in enforcement of rights and obligations derived from the exclusive representation principle. Thus in *Texas & New Orleans R.R.*,

the Court specifically rejected a carrier's claim that the requirements of Section 2 Third were not enforceable in the district courts. 281 U.S. at 567-569. And in *Virginian Railway*, the Court stated that "[i]t is, we think, not open to doubt that Congress intended that this requirement [to treat only with the duly designated representative for bargaining] be mandatory upon the railroad employer and that it's command, in a proper case, be enforced by the Courts". 300 U.S. at 545. *See also Steele v. Louisville & Nashville R.R.*, *supra*, in which the Court held that a union's duty of fair representation, which derives from its status as exclusive representative, is enforceable in federal court. 323 U.S. at 207, *citing Texas & New Orleans R.R.* and *Virginian Railway*.

It is therefore well-established that the prohibition against carrier direct dealing with individual union-represented employees over matters which concern rates of pay, rules and working conditions is fundamental to the conception of the Act and to the practical ability of employees to exercise the rights they have under the Act, and that federal courts' enforcement of that prohibition is essential to the proper functioning of the statute. The court of appeals' deciison that the district court lacked jurisdiction over the Unions' complaint is therefore contrary to several leading decisions of this Court concerning enforcement of the exclusive representation principle.

B. The Court Of Appeals' Decision That A Carrier's Merely Arguable Claim Of Waiver Of The Prohibition Against Direct Dealing Can Defeat District Court Jurisdiction Of A Claim Under The Exclusive Representation Principle Is At Odds With Precedent Of This Court Regarding Waivers Of Statutory Rights

The Court of Appeals recognized that the Unions' claim was "cognizable under the RLA" (Appendix A at [2369]), however, *citing Conrail v. RLEA*, it concluded that Santa Fe's assertion of a merely arguable claim that the Unions had acquiesced in prior employee buyouts

had divested the district court of jurisdiction of the Unions' complaint. Appendix A at 8a-10a. That conclusion is inconsistent with decisions of this Court concerning waivers of statutory rights; moreover, it is based upon a misapplication of this Court's decision in *Conrail v. RLEA*.

The Unions submit that the court of appeals' conclusion that this case involved a minor dispute was premised upon the fundamentally erroneous assumption that the prohibition against direct dealing can be waived. Based upon the precedent of this Court discussed in part A above, the Unions argued to the Fifth Circuit that because the rights at issue in this case are not derived from any agreement, but rather are rights conferred by the statute, and because those rights are integral to the operation of the statute, the Unions could not waive the rights of those employees to bargain with their employer only collectively through their designated representatives. Appendix A at 5a n.5. The Court of Appeals rejected that argument stating that "[t]he unions' assertion in this regard is contrary to a body of case law that permits unions to waive statutory rights under the RLA." *Id.*, citing this Court's decision under the NLRA in *Metropolitan Edison, supra*.

The Unions submit that the prohibition against direct dealing is so fundamental to the statute that a union is without authority to waive the rights of the employees it represents to bargain only collectively through their union. In *Medo Photo, supra*, the Court stated that because the NLRA "guarantees to all employees the right to bargain collectively through their chosen representative" direct dealing between employers and individual employees "would be subversive of the mode of collective bargaining which the statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent. . . ." 321 U.S.

at 687 (citations omitted). In *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), the Court stated that although unions may waive employee rights "in the economic area", or the right to strike in return for arbitration, unions may not waive NLRA Section 7 rights of employees. And in *Metropolitan Edison* the court stated that "a union may bergain away its member's economic rights, but it may not surrender rights that impair the employees' choice of bargaining representative." 460 U.S. at 705-706, *citing NLRB v. Magnovox, supra.*[6] Accordingly, the Unions submit that the Fifth Circuit's decision is contrary to precedent of this Court concluding that employee rights to negotiate only through their exclusive representatives may not be waived. The Unions further submit that since the RLA and NLRA precedent concerning the exclusive representation principle developed in lock-step, and since the reasons behind the NLRA rule precluding waiver of representation rights are equally applicable to the RLA, (*see Heinz v. NLRB*, 311 U.S. 514 (1940)), that NLRA precedent should have been followed in the instant case.

The notion that a rail union may waive employee rights under the exclusive representation principle is also refuted by the fact that Section 2 Eighth of the RLA (45 U.S.C. § 152 Eighth) provides that the provisions of Section 2 Third, Fourth and Fifth "are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them." Therefore, the Unions submit that the statutory guarantee of the employees' rights to representation by their designated representatives is an un-

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[6] Although the *Metropolitan Edison* decision did, as the court of appeals noted (Appendix A at 5a n.5), hold that a statutory right may be waived, the right at issue there, the right to strike did not concern representation rights, which, as is discussed above, the Court specifically concluded are not subject to waiver.

amendable provision of the "trade agreement" governing employment relations, mentioned in *J.I. Case*, *supra*, 321 U.S. at 335.

The Unions also submit that the Fifth Circuit's conclusion that employee exclusive representation rights may be waived is in conflict with the rationale of the Court of Appeals for the Eighth Circuit in *American Railway and Airway Supervisors Association v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), petition for cert. pending No. 89-1435, in which that court held that a railroad could not be compelled to participate in national negotiations over health and welfare issues even though it was a party to the railroad industry national health and welfare agreement, and even though it had participated in national negotiations on health and welfare issues for thirty years, concluding that the railroad had an absolute right to designate its own representative for collective bargaining. The Unions had argued that the nature of the subject for bargaining, as well as the railroad's prior conduct, required that it participate in national negotiations until it either obtained the unions' agreement to individual bargaining, or reached impasse on that issue. But the unions expressly stated that they did not contend that the railroad could not represent itself, only that it was required to represent itself in national negotiations. *Id.* at 677, 678. In rejecting rail labor's argument, the Eighth Circuit relied heavily upon this Court's decisions in *Texas & New Orleans R.R.*, *supra*, and *Virginian Railway*, *supra*, and it essentially concluded that the railroad's representation rights under Section 2 Third could not be waived by its past conduct. Thus the Eighth Circuit stated, "[t]he selection of a bargaining representative is not a subject of mandatory bargaining under the Act. Nor is it a term in any existing agreement. It is a right reserved to the parties by the Act"; it also stated that "[t]he railroad has a statutory right to designate tis own representative. . . ." *Id.* at 679.

While the Unions did not assert that that case involved a minor dispute because of a past practice of national bargaining, they relied heavily on the written agreement on health and welfare issues and the thirty years of practice between the parties, that argument based on the parties' conduct was far more substantial than Santa Fe's past practice argument in this case, yet the Eighth Circuit nonetheless concluded that a party's right to select its own representative precluded any waiver of that right. Furthermore, the Eighth Circuit's conclusion that the right to select one's own representative for bargaining is inalienable would not permit a different result if the unions had argued that that case involved a minor dispute. The Unions submit that the rationales of these two decisions cannot be harmonized. The Unions further submit that it cannot be that a railroad's rights under Section 2 Third will not be affected by participation in a multi-party agreement and a substantial history of multi-party bargaining, but that the rights of railroad employees under Section 2 Third can be vitiated by a merely arguable claim of waiver based upon isolated instances of buyouts of groups of employees. Thus, although the Unions dispute the Eighth Circuit's conclusion regarding national versus individual bargaining, they submit that the Eighth Circuit understood this Court's precedent on the waiver of statutory rights and that the Fifth Circuit did not.[7]

Furthermore, even if employee rights under the exclusive representation principle were statutory rights which could be waived, under *Metropolitan Edison* such waiver would have to be explicit, clear and unmistakable, and such waiver could not be found based upon a claim that

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[7] Rail labor's petition for a writ of certiorari to the Eighth Circuit in *ARASA v. Soo* is not at odds with the Unions' position in this case since rail labor expressly recognized that the Soo had a statutory right to represent itself in bargaining (cert. petition in No. 89-1435 at 20-22), and since the Unions recognized that the issue was a matter to be resolved by the federal courts.

was merely arguable. 460 U.S. at 708-709. The Court of Appeals rejected that alternative argument on the waiver issue stating that *Metropolitan Edison* was inapplicable here since that case involved the NLRA not the RLA. However, as is discussed above, given the common development of precedent under the two statutes, and the rationale behind the NLRA decisions, that rationale is equally applicable to RLA cases. Moreover if *Metropolitan Edison* could provide a rationale for the court of appeals' rejection of the Unions' claim that the exclusive representation principle cannot be waived (Appendix A at 5a n.5), the *Metropolitan Edison* waiver test (clear and unmistakable waiver) must be applicable to the determination of whether such a waiver has occurred.[8]

Since the Fifth Circuit's conclusion that this case involved a minor dispute because it involved interpretation of the alleged implied agreement waiving the prohibition against direct dealing was based upon the erroneous assumption that the Unions could have agreed to waive that statutory prohibition, or could have done so in the absence of a showing of clear and unmistakable waiver, the court of appeals' conclusion that Santa Fe's merely arguable claim of waiver could divest the district court of jurisdiction of the Unions' complaint was at odds with applicable precedent of this Court.

The court of appeals' holding that the Unions' claim was "within the exclusive jurisdiction of the NRAB" because Santa Fe's allegations of a past practice of employee buyouts "provided an arguable basis for its contention that its agreement with the unions permit the

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[8] The Court of Appeals' conclusion that application of the clear and unmistakable waiver test would be inconsistent with RLA precedent concerning the jurisdiction of federal courts and the NRAB (Appendix A at 11a n.9) is also in error because, as is discussed below, standards for determining whether a dispute is major or minor are inapplicable in a case involving enforcement of the exclusive representation principle.

challenged buyout program", and its rejection of the application of the clear and unmistakable waiver test were based upon this Court's decision in *Conrail v. RLEA*. The Unions submit that the court of appeals misunderstood *Conrail v. RLEA*, and that it is simply inapplicable here.[9]

Conrail v. RLEA involved rail labor's claim that a carrier had implemented a change in working conditions, a drug testing program, without prior bargaining and that the case therefore involved a "major dispute" within the jurisdiction of the federal courts. The carrier claimed that an agreement implied through past practice authorized the drug testing program and that the dispute was therefore one over contract interpretation and a minor dispute within the jurisdiction of the NRAB. Adopting the standard applied by most courts of appeals (105 L.Ed. 2d at 260-265), the Court concluded that Conrail's showing of an arguable basis for its claim of contractual authority rendered the dispute minor. *Id.* at 271-272. In so holding, the Court rejected the unions' argument that stricter scrutiny should be applied to a carrier's claim of contractual authority to make a unilateral change in working conditions and that, unlike minor dispute cases, a carrier involved in such a dispute could not imple-

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[9] Additionally, the Unions vigorously contested the existence of any agreement waiving the prohibition against direct dealing or on buyouts of employees. Appendix B at 22a. Thus there is a dispute as to the very existence of an agreement, not just a dispute over interpretation of an agreement. Since arbitrators only have authority to resolve disputes over existing agreements (*Slocum v. Delaware L. & W. R.R.*, 399 U.S. 239, 244 (1950); *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643-648-649 (1986), it was also inappropriate for the Court to authorize an arbitrator to determine whether there actually was an agreement; such determinations must be made by the district courts. The court's reliance upon *Conrail v. RLEA* on this point was in error since in that case there was no dispute as to the existence of an agreement on the issues giving rise to the unions' complaint. 105 L.Ed.2d at 267 n.9.

ment the change until its contractual argument was accepted by an arbitrator; the Court concluded that such a rule would be inconsistent with labor relations practice in which parties often have implicit agreements and agreements which confer upon management flexibility "within a specified area of activity." *Id.* at 265. It was that part of the *Conrail v. RLEA* decision which was relied upon by the Court of Appeals in rejecting the Unions' argument that Santa Fe's merely arguable claim of contractual authority for its actions could not divest the district court of jurisdiction over the Unions' complaint. Appendix A at 10a-11a.

However, *Conrail v. RLEA* involved a very different situation than the one at issue here where Santa Fe claimed an implied contractual waiver of the most fundamental statutory right of its employees. The instant case did not involve a union's claim of a carrier's refusal to bargain over a change in substantive working conditions and a carrier's claim that the parties had already bargained over that matter. Accordingly, the rationale of *Conrail v. RLEA*, that heightened scrutiny of a contractual defense to a claim of a change in working conditions, and imposition of a status quo requirement in such a situation, would frustrate the collective bargaining process, is inapplicable here, where the questions were whether the employees could obtain enforcement of their statutory right to bargain only through their collective bargaining representatives and whether, through alleged prior inaction the Unions' had waived that statutory right and the employees thereby lost their ability to exercise that right. While the Court concluded in *Conrail v. RLEA* that application of the arguable basis test promoted the statutory scheme in a refusal to bargain case; application of that test in a direct dealing case is destructive of the statutory scheme. Thus, the Unions submit that the Court of Appeals misunderstood and misapplied this Court's decision in *Conrail v. RLEA* and that that

decision certainly did not mandate dismissal of the Unions' complaint.

Accordingly, the Fifth Circuit's decision is contrary to a substantial body of decisions of this Court regarding waivers of the statutory rights of employees.

C. Even If Santa Fe's Waiver Argument Necessitated Arbitration, Dismissal Of The Unions Complaint Was Contrary To This Court's Decision In *Conrail v. RLEA*

In *Conrail v. RLEA*, the Court stated that when a carrier's claim of contractual authority to make a unilateral change in working conditions is arguably justified, the carrier may make the change and the court must "*defer* to arbitration", and that the effect of that ruling will be to "*delay* collective bargaining in some cases" and to "*delay* [] the onset of [the Section 6] process until the Board determines on the merits that the employer's interpretation of the agreement is incorrect. . . ." 105 L.Ed. 2d at 266 (emphasis added). The Court also stated that:

> In a situation in which the party asserting a contractual basis for its claim is "insincere" in so doing, or its position [is] founded upon . . . insubstantial grounds, "the result of honoring that party's characterization would be to undercut the prohibitions of § 2 Seventh and § 6 of the Act" against unilateral imposition of new contractual terms . . . In such circumstances, protection of the proper functioning of the statutory scheme requires the Court to substitute its characterization for that of the claimant.

105 L.Ed.2d at 263 (citations omitted).

It is evident that in a case in which a union alleges that a carrier has changed working conditions without complying with Section 6, *deferring* to arbitration and *delaying* "the onset of the Section 6 process" until an arbitrator finds the carrier's interpretation of the contract to be incorrect means that if an arbitrator rules

against the carrier, the collective bargaining process resumes and the requirements of the Act become enforceable in the district courts; otherwise the courts would be unable to ensure the "proper functioning of the statutory scheme" when a carrier's claim of contractual authority to make a change is found to be without merit.

This construction of the Act is consistent with the Court's earlier decision in *Order of Conductors v. Pitney*, 326 U.S. 561 (1946), which reversed a decision dismissing a union's complaint that a railroad's unilateral implementation of a change in working conditions would violate Section 6 of the Act, in response to the railroad's assertion that the dispute involved interpretation of agreements. The Court concluded that the district court should have *stayed* dismissal of the union's complaint until after the NRAB had ruled on the contract question, stating:

> Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly, the extraordinary relief of an injunction should be withheld, at least until then . . . . Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. But the Court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad. The dismissal of the cause should therefore be *stayed* by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants be protected in this proceeding.

Id. at 567-568 (citations and footnote omitted; emphasis added). *See also, Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 157 (emphasis added) (1969)—in *Pitney*, "we held that the

proper forum for interpreting the agreements was the [NRAB] and directed the District Court to *stay* its proceedings accordingly." [10]

The Unions submit that if deferral to arbitration and a stay of district court proceedings is required in refusal to negotiate cases, a stay rather than dismissal is certainly required in the instant case where the carrier's contract claim is that the Unions agreed to waive the exclusive representation rights of their members. Indeed the reasons for the district court to retain jurisdiction while arbitration is pending are particularly compelling in such cases since NRAB arbitrators have jurisdiction only to resolve disputes concerning interpretation of existing agreements (*Slocum v. Delaware, L & W R.R.*, 399 U.S. 239, 244 (1950); *cf. AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-649 (1986); *United Steelworkers of American v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)), and since arbitrators do not have authority to adjudicate issues arising under federal laws. *Alexander v. Gardner-Denver*, 415 U.S. 36, 53 (1974), *citing United Steelworkers, supra.* Therefore, if an arbitrator determines that Santa Fe's contract claim is without merit, the arbitrator will not have authority to declare that Santa Fe violated Section 2 Third, or to enjoin Santa Fe from further such violations.

Accordingly, the court of appeals' refusal to order that the district court retain jurisdiction of the Unions' com-

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[10] A stay of proceedings pending arbitral resolution of contract issues is also the approach taken in many cases under the National Labor Relations Act when a contractual defense is raised in response to an unfair labor practice charge. *Carey v. Westinghouse*, 375 U.S. 262, 275 (1964); *United Technologies Corporation*, 268 NLRB No. 83 (1984). That the NLRB also requires arbitration in some cases involving contractual defenses to alleged violations of law also refutes the court of appeals' conclusion (Appendix A at 11a n.9) that the RLA arbitral process is a reason for distinguishing between the two statutes with regard to the clear and unmistakable waiver test.

plaint pending the outcome of arbitration was contrary to precedent in this court; it also left the Unions without an effective avenue for vindication of the statutory rights of their members, in the event that Santa Fe's waiver argument is rejected in arbitration.

II. GENERAL ADOPTION OF THE COURT OF APPEALS' REASONING WILL SUBSTANTIALLY UNDERMINE OPERATION OF THE STATUTE

As is discussed above, this Court has consistently recognized that the exclusive representation principle, and federal court enforcement of that principle, are integral to operation of the RLA and to effecutation of the policies embodied in that statute. The instant case presents an excellent illustration of the importance of that principle to the operation of the statute. As the court of appeals observed, Santa Fe's furloughs during the fall of 1987 had created substantial concern among employees as to their job security, and as a result, many employees rushed to accept the buyout offer. Appendix A at 2a. Indeed, Santa Fe was able to obtain virtually all the resignations it sought within twenty-four hours of its announcement of the buyout program. Furthermore, it was able to obtain these resignations even though the employees were potentially entitled to protective benefits under an agreement which the Unions claimed was applicable to the Cleburne shop employees (Appendix A at 5a-6a); and even though those benefits were more generous than those offered by Santa Fe in its buyout program. Record Excerpts at 25.

Had the Santa Fe complied with the requirements of the RLA, the employees could have decided collectively whether to agree to implementation of the buyout program; if they agreed, they could have negotiated collectively with Santa Fe over the terms of such a program including a notice period, an orderly procedure for the filing of applications and objective criteria for the acceptance of applications (*e.g.*, seniority, availability of

other employment etc.). Instead, Santa Fe implemented a program with no notice, which was available for a limited but unspecified period on a first come-first served basis and acceptance of applications was solely at the discretion of the Santa Fe. The result was panic and effective evasion of the employees' collective bargaining rights as a result of that panic.

The Unions submit that Santa Fe's implementation of its buyout program at Cleburne was antithetical to Section 2 Third and Ninth and the policies behind the Railway Labor Act, and that those events forcefully demonstrate the reason for this Court's recognition of the importance of the exclusive representation principle and the necessity of district court enforcement of the prohibition against direct dealing. However, Santa Fe was allowed to avoid the Unions' effort to obtain enforcement of the statute by advancing a merely arguable claim that the Unions waived that fundamental statutory right. Such a result effectively nullifies the exclusive representation principle because Santa Fe's employees were placed in the position of bargaining individually with their employer despite their choice to bargain only collectively through their designated representatives, and because an arbitrator assigned to resolve Santa Fe's contractual waiver claim will not have authority to interpret or enforce the RLA. Thus dismissal of the Unions' complaint based upon Santa Fe's waiver claims will have the effect of precluding enforcement of the exclusive representation principle. As this Court recognized in *Texas v. New Orleans*, *supra*, the existence of rights under Section 2 Third is of little value if those rights cannot be enforced. 281 U.S. at 569-570.

Accordingly, adoption of the Fifth Circuit's reasoning will substantially undermine effective operation of the RLA by disabling the fundamental principle upon which the statute rests. Moreover, the instant case does not stand in isolation. Other railroads have unilaterally im-

plemented buyout programs and two other courts of appeals have held that union challenges to those programs involved minor disputes. *See e.g. International Association of Machinists and Aerospace Workers v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988), *cert. denied*, —— U.S. ——, 103 L.Ed.2d 181 (1989); *Brotherhood of Railway and Airline Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988). Given the importance of the exclusive representation principle to operation of the RLA, and the adverse effects of broader adoption of the reasoning of the court below, the Unions respectfully submit that in order to prevent widespread abuse of the rights of railroad workers, and to ensure effective operation of the Railway Labor Act, the Court should grant this position.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review and reverse the judgment of that court in *Brotherhood of Railway Carmen (Division of T.C.U.) v. Atchison, Topeka & Santa Fe Ry., supra.*

Respectfully submitted,

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Dated: June 28, 1990

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-7012

BROTHERHOOD OF RAILWAY CARMEN (DIVISION OF TCU), *et al.*,
Plaintiffs-Appellants

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Feb. 28, 1990

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

WISDOM, Circuit Judge:

Defendant/appellee Santa Fe is an interstate carrier subject to the Railway Labor Act (RLA).[1] The plaintiff/appellant unions are the exclusive bargaining representatives of Santa Fe's employees. The unions allege that a voluntary resignation program offered by Santa Fe to its employees constituted direct dealing in violation of the RLA. Santa Fe contends that the program was permitted by its collective-bargaining agreements with the unions. The district court found that this case presents a minor dispute subject to compulsory arbitration under the RLA. 703 F.Supp. 597. We AFFIRM.

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[1] 45 U.S.C. § 151 et seq.

I

On December 21, 1987, Santa Fe posted a notice to its Cleburne shop employees offering, to a limited number of employees on a first come, first serve basis, an opportunity to terminate their employment in return for $20,000. Santa Fe required applicants for that "voluntary resignation" or "buyout" program to waive all claims and rights under applicable collective bargaining agreements as well as any other claims against Santa Fe.

During the four months prior to the buyout offer, Santa Fe had furloughed a number of shop craft employees at its Cleburne facility. Employees were, therefore, concerned about their job security, and many rushed to accept the buyout. Over two hundred Cleburne employees accepted the buyout offer.

On January 12, 1988, six of Santa Fe's shop craft unions filed suit in federal district court, seeking a declaratory judgment and injunctive relief against the buyout program. In the one cause of action now pursued on appeal, the unions assert that in offering the buyout program, Santa Fe violated RLA §§ 2 First, Second, Third, Fourth, and Ninth [2] by dealing directly with Cleburne shop employees rather than negotiating through their designated representatives, the unions. Santa Fe argues that collective agreements with the unions permitted it to deal directly with individual workers to buy out their employment rights.

On October 26, 1988, the district court entered an order dismissing the unions' complaint for lack of jurisdiction. The district court found that, since the collective agreements between Santa Fe and the unions arguably permitted Santa Fe's buyout program, the case involved a "minor dispute" subject to compulsory arbitration under the RLA.

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[2] 45 U.S.C. §§ 152 First, Second, Third, Fourth, and Ninth.

On December 12, 1988, the unions filed a Notice of Appeal. The unions thereafter filed a Motion for Injunction Pending Appeal. That motion was denied by the district court on December 21, 1988. A similar motion was denied by this court on January 6, 1989.

This court now AFFIRMS the district court's judgment dismissing the unions' complaint for lack of jurisdiction.

II

A preliminary issue is raised regarding this court's jurisdiction over five of the appellants in this case. The Notice of Appeal filed by the unions designated "Brotherhood of Railway Carmen (Division of TCU), et al." as the appellants; none of the other five plaintiff unions were specifically named in the notice. This raises the question whether the "et al." designation in the Notice of Appeal was sufficient under Fed.R.App.P. 3 to perfect an appeal for the five plaintiff unions not specifically named in the notice.

Rule 3(c) requires that a "notice of appeal shall specify the party or parties taking the appeal". The Supreme Court, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, ——, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285, 292 (1988), made clear that an et al." designation will not suffice to perfect an appeal for unnamed appellants. The Court explained that,

> The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for

costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

In the case before us, however, although five of the plaintiff unions were designated only as "et al." in the Notice of Appeal, that defect was cured by the fact that all six plaintiff unions were listed by name as appellants in a Memorandum in Support of Appellants' Motion for Injunction Pending Appeal. That supporting memorandum was filed within thirty days of the district court's judgment dismissing the case. In sum, within the thirty day period in which notice of appeal may be filed, all six unions seeking to appeal were clearly identified to both the appellees and the court. Thus, the required notice was provided within the thirty day period prescribed and the notice purposes of Rule 3(c) were served.

As the Supreme Court observed in *Torres*, "[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.*, 487 U.S. at ——, 108 S.Ct. at 2408, 101 L.Ed.2d at 291. Since the Notice of Appeal along with the Memorandum provided adequate notice within the prescribed period, we hold that the unions' actions constituted the functional equivalent of what Rule 3(c) requires. This court has jurisdiction over the appeal of all six unions.[3]

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[3] This court has looked to the purpose rather than the letter of Rule 3(c)'s specificity requirement. For example, in *Pope v. Mississippi Real Estate Comm.*, 872 F.2d 127, 129 (5th Cir. 1989), this court held that, in an action brought by a husband and wife, a notice of appeal that was styled "James William Pope, et al." and that stated "plaintiffs do hereby appeal" conferred jurisdiction of the wife's appeal because, since there were only two plaintiffs

III

The unions charge that the buyout program offered to employees by Santa Fe without consultation with the unions constituted direct dealing regarding mandatory bargaining subjects (i.e., rates of pay, rules or working conditions) in violation of the RLA.[4] Santa Fe argues that its buyout program did not constitute direct dealing regarding mandatory subjects. Santa Fe argues, in the alternative, that even if the buyout program would otherwise have constituted an RLA violation the program was permitted by collective agreement between Santa Fe and the unions.[5]

Addressing Santa Fe's first argument, we find that an RLA dispute is presented here. Even if the buyout program did not itself constitute direct dealing regarding mandatory subjects (a question we need not decide here), it may have functioned to "undermine collective bargaining rights". According to the 1964 Shopcrafts Agree-

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in the case, the designation "et al." could refer only to Mary Pope and the reference to "plaintiffs" could refer only to James and Mary Pope.

[4] Sec. 2 Seventh of the RLA (45 U.S.C. § 152 Seventh) states that no carrier, "shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in § 156 of this title."

[5] The unions argue that, not only did they not contractually permit buyout programs, but they would not even have been authorized to do so because they are not authorized to waive their statutory right against direct dealing, even for specific programs such as a buyout program. The unions' assertion in this regard is contrary to a body of case law that permits unions to waive statutory rights under the RLA. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06, 103 S.Ct. 1467, 1475-76, 75 L.Ed.2d 387 (1983) (stating that "[t]his Court has long recognized that a union may waive a member's statutorily protected rights, including 'his right to strike'. . . . Thus, a union may bargain over its members' economic rights, but it may not surrender rights that impair employees' choice of their bargaining representative").

ment between Santa Fe and the unions, employees would be entitled to certain rights and benefits in the event that they were adversely affected by transfers of work. The unions allege that such work transfers were occurring and were adversely affecting employees at the time of the buyout offer. If the unions' allegations are true, then, by offering the buyout program and dealing directly with individual employees regarding acceptance of the buyout offer, Santa Fe effectively circumvented whatever obligations it might have had under the Shopcrafts Agreement by "buying out" employees one at a time.[6]

In *J.I. Case v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944), the Supreme Court stated that,

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to . . . limit or condition the terms of the collective agreement. . . .
>
> We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement. . . . But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation . . . in the matters covered by collective agreement.

321 U.S. at 337, 339, 64 S.Ct. at 580, 581.[7]

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[6] Santa Fe denies that transfers of work by which it would have incurred obligations under the Shopcrafts Agreement were occurring at the time in question. We do not decide here whether work transfers were occurring. We do note, however, that the very existence of controversy on that question would have gone far to induce employees not to attempt to collect work-transfer benefits under the Agreement but, rather, to accept the $20,000 cash offered in the buyout offer.

[7] That an individual contract may benefit an individual employee does not alter or detract from the meaning of the Court's statement in *J.I. Case*, 321 U.S. at 337, 339, 64 S.Ct. at 580, 581.

Those principles stated in *J.I. Case* are equally applicable in cases brought under the RLA. As the Supreme Court stated in *Order of R. Telegraphers v. Railway Exp. Agency*, "[t]he decision in *J.I. Case Co. v. National Labor Relation Bd.* . . . considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable [in cases brought under the RLA]." 321 U.S. 342, 347, 64 S.Ct. 582, 585, 88 L.Ed.2d 788 (1944).

The buyout program, about which Santa Fe dealt directly with employees, may have functioned to undermine the collectively-bargained Shopcrafts Agreement and to reduce Santa Fe's obligations under that agreement. As such, the buyout program may have violated the RLA regardless of whether it constituted direct dealing regarding mandatory subjects (a question we do not pass on here). The unions, therefore, have stated a dispute cognizable under the RLA.

IV

The RLA provides two distinct procedures to promote the resolution of labor disputes. If there is a "major dispute", then, before resorting to self-help, the parties are required to submit to conference and, if necessary, mediation. 45 U.S.C. §§ 152, 154-56. Where the dispute is classified as "minor", if not settled informally, it is subject exclusively to resolution through arbitration. 45 U.S.C. sec. 153. *See, e.g., Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322, 92 S.Ct. 1562, 1564, 32 L.Ed.2d 95 (1972).

The Supreme Court first articulated the distinction between minor and major disputes in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945). That distinction recently was developed by the Supreme Court in *Consolidated Rail v. Labor Executives*, 491 U.S. ——, 109 S.Ct. 2477, 105

L.Ed.2d 250 (1989). Drawing on *Burley* and its progeny, the Court in *Consolidated* explained that,

> [T]he major dispute category . . . "relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreemnt or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. . . ." *Burley*, 325 U.S. at 723, 65 S.Ct. at 1290.
>
> In contrast, the minor dispute category [relates to] dispute[s] arising or growing "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." This second category of disputes "contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. . . ." *Burley*, 325 U.S. at 723, 65 S.Ct. at 1290.
>
> A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board, § 3, or before an adjustment board established by the employer and the unions representing the employees. § 3 Second. The Board . . . has exclusive jurisdiction over minor disputes. . . .

Consolidated, 491 U.S. at ——, 109 S.Ct. at 2480-82, 105 L.Ed. at 261-63 (some citations omitted).

The unions in the present case argue that the dispute presented here is neither a major nor a minor dispute but, rather, a direct statutory violation of the RLA's prohibition against direct dealing. But Santa Fe contends that the buyout program was permitted under its collective agreements with the unions. If Santa Fe's contention is correct, then there has been no violation of the RLA. Resolution of this dispute turns on interpre-

tation of the contractual agreements between the parties. The case, therefore, involves a minor dispute.

The unions argue that permitting Santa Fe to render this case a minor dispute simply by stating a contractual defense inappropriately allows the defendant to define the statute of the dispute. The Supreme Court has acknowledged that determination of whether a dispute is major or minor is, to some extent, "a matter of pleading".[8] To safeguard against abuse of the parties' power to define the status of the dispute, the Court has prescribed an "arguable basis" test by which parties' contract-based claims must be measured. As the Court explained in *Consolidated*,

> The party who initiates a dispute takes the first step towards categorizing the dispute when it chooses whether to assert an existing contractual right to take or to resist the action in question. But the Courts of Appeals early recognized that there is a danger in leaving the characterization of the dispute solely in the hands of one party. . . .
>
> To satisfy th[e] need for some degree of judicial control, the Courts of Appeals uniformly have established some variant of the standard employed by the Third Circuit in this case:
>
> "[I]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is a [minor dispute] within the exclusive province of the National Railroad Adjustment Board." . . .

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[8] *Consolidated*, 491 U.S. at ——, 109 S.Ct. at 2482, 105 L.Ed.2d at 263.

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Consolidated, 491 U.S. at ——, 109 S.Ct. at 2482, 105 L.Ed.2d at 263-64 (citations omitted, footnotes omitted). If Santa Fe's contention that the buyout program was permitted under the collective agreements is "arguably justified", then this case presents a minor dispute.

The unions, however, suggest that, where an alleged contractual provision involves waiver of a statutory right under the RLA (such as unions' right to be free from direct dealing by employers), a heightened level of scrutiny, exceeding the "arguable basis" test, should be employed in determining whether a dispute should be considered minor. Addressing a similar suggestion, the Court in *Consolidated* stated that,

> The effect of a selectively heightened level of scrutiny (a "clear and patent" rather than an "arguably justified" standard) would be to limit the enforceability of [contract terms that grant management the power to respond flexibly to changing circumstances]. . . . To accept the bifurcated standard the Union advocates would, in effect, be impermissibly to "pass upon the desirability of the substantive terms of labor agreements," by affording flexible terms a less favored status. . . .
>
> We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement . . ., the employer may make the change

> and courts must defer to the arbitral jurisdiction tion of the Board.[9]

Consolidated, 491 U.S. at ——, 109 S.Ct. at 2483-84, 105 L.Ed.2d at 265-66 (citation omitted).

Applying the principles articulated in *Consolidated*, this case presents a minor dispute.[10] Santa Fe has at

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[9] The appellants cite *Metropolitan Edison*, 460 U.S. 693, 103 S.Ct. 1467, in support of their argument that a "clear and explicit waiver" rather than an "arguable basis" test should be applied in this case. But *Metropolitan Edison's* "clear and explicit waiver" test is the test for determining actual substantive contractual questions (under the National Labor Relations Act). It is not the test for determining the preliminary question of what body has jurisdiction to address the underlying contractual dispute (under the RLA). *Id.* at 708-09, 103 S.Ct. at 1477-78. The appellants' reliance on *Metropolitan Edison* is misplaced. This court recently said as much when it stated that,

> we find it to be a debatable matter of law whether, or to what extent, the rule of construction requiring that a waiver of bargaining rights under the NLRA be clear and unmistakable applies in a case arising under the RLA. . . .
>
> Even assuming . . . that . . . a clear and unmistakable waiver [is required under the RLA], the construction proposed by [the carrier] satisfies the minimal burden of arguably being a clear and unmistakable waiver. . . . We decide . . . that the arbitration board is the forum authorized to construe the clause.

International B'hd. of Teamsters v. Southwest Airlines, 875 F.2d 1129, 1136 (5th Cir. 1989) (en banc) (emphasis added).

[10] The instant case does not present either of the two types of special circumstances in which federal courts may assert jurisdiction over cases that would otherwise involve minor disputes subject to compulsory arbitration under the RLA. The first such type of special circumstance involves cases in which the extrajudicial dispute-resolution framework of the RLA is either ineffective, *see, e.g., Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 917 (1974), or unavailable, *see, e.g., Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (1970). *See also, Switchmen's Union of North America v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S.Ct. 95, 96-97, 88 L.Ed. 61 (1943) (stating that, "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a

least an arguable basis for its contention that its collective agreements with the unions permit the challenged buyout program. Santa Fe's contractual argument rests on both express and implied terms of the collective agreements. As the District Court in this case acknowledged, and as the Supreme Court in *Consolidated* stated, "collectively-bargained agreements may include implied as well as express terms. Furthermore, it is well established that the parties' 'practice, usage and custom' is of significance in interpreting their agreement". *Consolidated*, 491 U.S. at ——, 109 S.Ct. at 2485, 105 L.Ed. 2d at 267 (citations omitted).

We agree with the district court that, although Santa Fe's claims relying on the express terms of the Shopcrafts Agreement are insubstantial [11], the claims based on implied terms—specifically, the past practices of the parties including previous resignation offerings [12] and individually-negotiated resignation agreements—do have

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rights which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control").

The second type of exceptional circumstance involves actions taken by a carrier for the purpose of weakening or destroying a union. *See, e.g., Central of Ga. Ry.*, 305 F.2d 605, 608-09 (1962). *See generally, Brotherhood of Ry., etc. v. Atchison, Topeka & Santa Fe*, 847 F.2d 403, 411 (7th Cir. 1988). Neither type of exceptional circumstance exists in the prsent dispute.

[11] Santa Fe argues that the express terms of the Shopcrafts Agreement permit the buyout program because the Agreement states that an employee is not entitled to the Agreement's protective benefits in the event of the employee's resignation. That the Agreement recognizes the right of an individual employee to resign and denies protective benefits upon resignation does not mean that the Agreement permits Santa Fe to deal directly with employees to solicit and define the terms of their resignations.

[12] Previous "voluntary resignation" offerings allegedly were made by Santa Fe in January, 1984 and in January, May and August of 1987.

some arguable basis sufficient to render this a minor dispute.

V

We find this case to involve a minor dispute subject to compulsory arbitration before the National Railroad Adjustment Board or before an adjustment board established by Santa Fe and the unions. We AFFIRM the district court's opinion dismissing this case for lack of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-88-0089-T

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF TCU), *et al.*,
Plaintiffs,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 26, 1988]

On March 3, 1988, Plaintiffs filed their Motion for Summary Judgment. On April 18, 1988, Defendant filed its Motion for Summary Judgment.

Background

Plaintiffs are six unions[1] which are the collective bargaining representatives of indviduals employed by Defendant Atchison, Topeka & Santa Fe Railway Com-

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[1] The Plaintiff unions are: Brotherhood of Railway Carmen, International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers and Blacksmiths, International Brotherhood of Electrical Workers, Sheet Metal Workers International Association, and International Brotherhood of Firemen and Oilers.

pany. Defendant is an interstate carrier subject to the regulations of the Railway Labor Act, 45 U.S.C. § 151-88 ("the RLA"). Plaintiffs filed this action seeking declatory and injunctive relief against Defendant. Their complaint arises from Defendant's implementation of a "Voluntary Resignation Program" for certain of its employees, which Plaintiffs allege violated the RLA. Specifically, Plaintiffs contend that Defendant violated section 2, paragraphs Second, Third, Fourth and Ninth of the RLA, 45 U.S.C. § 152 ¶¶ Second, Third, Fourth and Ninth, by bargaining directly with individual employees over matters which are subject to collective bargaining under the RLA, and violated section 2, paragraph Seventh and section 6 of the RLA, 45 U.S.C. § 152, ¶ Seventh and § 156, by unilaterally changing the rates of pay, rules and working conditions of the affected employees.

Facts

Defendant operates a facility in Cleburne, Texas, where it employs individuals to perform repair work on locomotives and rail cars. Plaintiffs are the certified representatives of those employees for purposes of collective bargaining. Plaintiffs and Defendant are parties to various collective bargaining agreements governing the rates of pay, rules and working conditions of its shop employees, including an agreement known as the "1964 Shop Crafts Agreement" ("the Agreement"). The Agreement provides, among other things, protective benefits for employees who are dismissed or suffer a decrease in compensation as a result of certain operational changes.

During the last four months of 1987, Defendant laid off (furloughed) a number of shop craft employees at its Cleburne, Texas facility. On December 21, 1987, Defendant posted a notice at the Cleburne facility, offering certain shop craft employees an opportunity to voluntarily resign in return for a lump sum payment of $20,000. The notice further stated that the number of voluntary

resignations would be limited by the company, and that the offer would expire on December 29, 1987. As a condition of its acceptance of the "buy-out" of their employment rights, Defendant required applicant employees to sign a release waiving any and all claims and rights they might have had under applicable collective bargaining agreements as well as any other claims the employees might have had against Defendant.

On that same day and on the following day, certain of Plaintiffs' officials informed Defendant that, in Plaintiffs' opinion, Defendant's Voluntary Resignation Program violated the Railway Labor Act in that it constituted unlawful direct dealing with employees and a unilateral change in the 1964 Shop Crafts Agreement.

Plaintiffs allege that Defendant initiated its "buy out" program in an effort to avoid paying certain protective benefits to employees at the Cleburne facility. It is undisputed that under the Agreement, if certain operational changes occur at a facility and cause employees to be deprived of employment or placed in a worse position with respect to compensation, protective benefits must be paid to those employees who are adversely affected. One of the operational changes which will trigger protective benefits is the transfer of work from one of Defendant's facilities to another, thereby diminishing the amount of work available at the facility where the work was originally performed. Plaintiffs allege that Defendant had been slowly transferring certain work from its Cleburne, Texas facility to its San Bernadino and Topeka facilities. Plaintiffs argue that the reduction in work at the Cleburne facility was due to Defendant's transfer of work and that the employees affected are entitled to protective benefits. Therefore, Plaintiffs contend, Defendant's "buyout" program affected matters which are subject exclusively to collective bargaining.

Defendant contends that the "buyout" of employees was caused by a decline in business at the Cleburne facility which was not caused by a transfer of work, and that

employees are therefore not entitled to protective benefits under the Agreement. Defendant further asserts that this factual dispute need not be resolved by this Court because the issues presented in this case are within the exclusive jurisdiction of the National Railway Arbitration Board (NRAB).

Plaintiffs filed this action on January 12, 1988, seeking a declaratory judgment that Defendant's actions constitute unlawful direct dealing with its employees in circumvention of their collective bargaining representatives in violation of the RLA, and that Defendant's actions constitute a unilateral change in the rates of pay, rules and working conditions of its shop employees in violation of the notice, negotiation and status quo requirements of the RLA. Additionally, Plaintiffs seek an order enjoining Defendant from any further direct dealing with any of its shop employees to purchase their resignations.

Discussion

Plaintiffs' complaint alleges that this Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, 2201 and 2202. Jurisdiction pursuant to those sections is based on alleged violations of the Railway Labor Act, 45 U.S.C. §§ 151-88.

Defendant, on the other hand, contends that this Court does not have jurisdiction over the parties' dispute for two reasons. Plaintiff asserts, and Defendant agrees, that the RLA mandates collective bargaining only with respect to rates of pay, rules, or working conditions. Defendant argues that its Voluntary Resignation Program did not involve any of the foregoing mandatory-bargaining subjects and therefore could not have violated the RLA. Defendant further argues that this action does not involve a "major" dispute which would confer jurisdiction on this Court.

This Court finds that it is not necessary to address Defendant's contention that the Voluntary Resignation

Program did not involve "rates of pay, rules, or working conditions" which are subject to mandatory arbitration. The issue of whether this Court has jurisdiction over violations of the RLA is resolved on another basis.

Federal courts determine whether they may exercise jurisdiction over labor disputes involving interstate rail carriers by analyzing the nature of the dispute at hand. *Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees (BRAC) v. Atchison, Topeka and Santa Fe Railway Company*, 847 F.2d 403 (7th Cir. 1988). Two separate grounds may confer federal jurisdiction:

> First, federal courts may entertain suits involving major disputes. Major disputes are those that involve formation, rather than interpretation, of collective bargaining agreements. Second, federal courts may exercise jurisdiction over some disputes which involve violations of specific provisions of the RLA.

BRAC, 847 F.2d at 405 (citations omitted).[2]

With regard to the issue of jurisdiction based on allegations of violations of specific provisions of the RLA, the court in *BRAC* found that, "The scope of federal courts' jurisdiction over RLA violations is limited to exceptional circumstances requiring judicial intervention." *BRAC*, 847 F.2d at 408. That court also found that federal courts stress that their jurisdiction over RLA violations is quite narrow, and that in disputes in which the RLA's extrajudicial dispute-resolution mechanisms are capable of adequately protecting the rights of the parties, federal courts may not interfere with the statutory process. *BRAC*, 847 F.2d at 409.

After analyzing cases in which courts had found that federal jurisdiction existed, the court in *BRAC* concluded

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[2] The facts and arguments made in that case are virtually identical to those in the instant case.

that cases involving "exceptional circumstances requiring judicial intervention" could be roughly divided into two groups: 1) those in which the extrajudicial dispute-resolution framework of the RLA is either unavailable or ineffective; and 2) those which involve actions taken by an employer with specific intent to weaken or destroy a union.

The Court finds that Plaintiffs have not alleged that this action involves exceptional circumstances which would require this Court to exercise jurisdiction over Plaintiffs' claims. In fact, Plaintiffs do not vigorously assert that this Court has jurisdiction over Plaintiffs' claims on the ground that they are based on violations of the RLA, and the Court finds that Plaintiffs do not cite any persuasive authority to that effect. The principal dispute over this Court's jurisdiction appears to center around whether Plaintiffs' claims involve a "major" or "minor" dispute.

The RLA itself does not classify disputes as either "major" or "minor." The Supreme Court articulated those classifications of disputes between parties governed by the RLA to distinguish between disputes governed by section 2 of the RLA and those decided under section 3. *BRAC*, 847 F.2d at 405.

> The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or when it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to he assertion of rights claimed to have vested in the past.
>
> The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in

> terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 723 (1945). "In essence, a major dispute involves the creation of a contract or a change in the terms of an existing contract, while a minor dispute involves the interpretation or application of an existing contract." *BRAC*, 847 F.2d at 406. Minor disputes, if not settled informally, are subject to the exclusive jurisdiction of the NRAB. *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1971).

While the parties to the instant action appear to agree on the definitions of "major" and "minor" disputes, they do not agree on which of those two classifications describes the dispute in this action. Plaintiffs contend that this dispute is "major" and that this Court has jurisdiction; Defendant contends that the dispute is "minor" and therefore within the exclusive jurisdiction of the NRAB.

To determine if a dispute involves the interpretation or application of an existing contract, the Court must determine whether the actions of the employer were "'arguably" permitted by the collective bargaining agreement between the parties. *See St. Louis Southwestern Railway Company v. United Transportation Union*, 646 F.2d 230 (5th Cir. 1981). In so doing, the court does not restrict its analysis solely to the explicit terms of the written documents, but looks also to the established past practices that form the course of dealing between the parties. *BRAC*, 847 F.2d at 406. Past practices, however, will not be admitted to contradict the express pro-

visions of a written contract. Instead, they are admitted when the parties' written agreement is silent regarding the actions which are in dispute. *BRAC*, 847 F.2d at 406, n.1.

Defendant contends that the Agreement between the parties arguably permits it to engage in Voluntary Resignation Programs in two ways: 1) the Agreement permits employees to voluntarily resign, and 2) the Agreement does not expressly prohibit Defendant's Voluntary Resignation Programs with employees.

Article I, § 3 of the Agreement provides in relevant part:

> An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation and rules governing working conditions in case of his resignation. . . .

Defendant argues that by expressly and unconditionally acknowledging the possibility of an employee's resignation and dictating its results in the context of labor protection, the explicit language in the Agreement at least "arguably" permits the solicited resignations which Plaintiffs challenge here.

Defendant also argues that the Agreement does not expressly prohibit Defendant's Voluntary Resignation Program and that it is the past practice of the parties to allow such programs. In support of this contention, Defendant submitted the affidavit of the Assistant to the Vice-President-Labor Relations, of Defendant, who avers that Defendant has conspicuously solicited voluntary resignations of craft employees in exchange for lump sum payments. The affiant states that in January, 1984, January 1987, May 1987, and August, 1987, Defendant implemented voluntary resignation programs which were virtually identical to the one at issue here.

The Court finds that the Agreement does not address voluntary resignation programs of the type initiated by

Defendant.[3] It is therefore appropriate for the Court to examine the course of dealing between the parties to determine if any agreement exists between the parties with regard to voluntary resignation programs. *BRAC*, 847 at 406. If the evidence submitted in support of Defendant's motion for summary judgment supports a nonfrivolous claim that the voluntary resignation program was consistent with a mutually understood course of dealing between Plaintiffs and Defendant, the Court must conclude that the dispute is minor and within the exclusive jurisdiction of the NRAB. *BRAC*, 847 F.2d at 408.

In response to Defendant's evidence of past dealing, Plaintiff submits affidavits which attempt to discredit the significance of the former resignation programs which Defendant implemented. While some of the evidence which Plaintiff submits has relevance, the Court finds that it is not sufficient to render frivolous Defendant's allegation of "course of past dealing". The conduct which Defendant offers as evidence of an established past practice between the parties is not so dissimilar to the challenged practice that the Court is prevented from finding that the currernt practice was a part of the parties' course of dealing. *BRAC*, 847 F.2d at 403.

This Court concludes that Defendant's claim that the voluntary resignation program was consistent with a mutually understood course of dealing between the parties is nonfrivolous. Therefore, the dispute presented in this case is minor and within the exclusive jurisdiction of the Arbitration Board. The Court notes, however, that

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[3] The Court bases this finding on the Synthesis of Agreement submitted as Exhibit 1 to Plaintiffs' Amended Complaint. The parties did not provide the Court with a copy of the original 1964 Shop Crafts Agreement, so the Court must assume that the parties intended for the Court to resolve this dispute by relying on the contents of the Synthesis of Agreement.

this conclusion does not address the merits of Defendant's contractual justification claim, and that the question of whether an enforceable contractual obligation exists is solely for the Arbitration Board. *See BRAC*, 847 F.2d at 408.

It is therefore ORDERED that Defendant's motion for summary judgment is granted and that Plaintiff's motion for summary judgment is denied.

Signed this 25th day of October, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-88-0089-T

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF TCU), *et al.*,
Plaintiffs,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

JUDGMENT

[Filed Oct. 26, 1988]

This action came on for consideration before the Court on Cross-Motions for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Plaintiff's complaint is dismissed and that costs of court are taxed against Plaintiff.

Signed this 24 day of October, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-88-0089-T

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF TCU), *et al.*,
Plaintiffs,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendants.

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

[Filed Dec. 5, 1988]

On November 8, 1988, Plaintiffs filed their Motion to Alter or Amend Judgment Dismissing Complaint.

The Court has considered Plaintiff's motion and argument of counsel and is of the opinion that it should be denied.

It is therefore ORDERED that Plaintiff's motion to alter or amend judgment is denied.

Signed this 5th day of December, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

APPENDIX C

STATUTES RELIED UPON

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts))

A. Section 2 First

45 U.S.C. § 152 First

It shall by the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Third

45 U.S.C. § 152 Third

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

C. Section 2 Fourth

45 U.S.C. § 152 Fourth

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

D. Section 2 Eighth

45 U.S.C. § 152 Eighth

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

E. Section 2 Ninth

45 U.S.C. § 152 Ninth:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved,

or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carrier to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

F. Section 3 First

45 U.S.C. § 153 First (i)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

G. Section 6

45 U.S.C. § 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board.

FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROTHERHOOD OF RAILWAY CARMEN
(Division Of TCU), *et al.*,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Was the Fifth Circuit correct in affirming the district court's judgment that the Petitioner-Unions' claim of unlawful direct dealing in violation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), involved a minor dispute within the exclusive jurisdiction of the RLA arbitration board?

LIST OF PARTIES

The parties are properly identified in the caption and in footnote 1 of Petitioner-Unions' brief.

RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, Respondent's parent companies are Santa Fe Industries, Inc. and Santa Fe Pacific Corporation. In addition, Respondent jointly owns the following subsidiaries: Alameda Belt Line, Central California Traction Company, The Oakland Terminal Railway, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 LISTING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. Course of Proceedings	4
REASONS FOR DENYING THE WRIT	6
I. THE FIFTH CIRCUIT'S DECISION IS IN CONFORMITY WITH WELL-ESTABLISHED SUPREME COURT PRECEDENT	7
A. The Fifth Circuit Correctly Held That This Case Involves a Minor Dispute Under the Railway Labor Act	7
B. The Fifth Circuit Correctly Decided the Claims Regarding Direct Dealing, Waiver and Stay of Proceedings	11
1. The RLA Permits a Carrier To Deal Directly with Employees in Compensating Them for Their Voluntary Resignations	12
2. The Fifth Circuit Properly Rejected the Unions' "Waiver" Arguments	17
3. The Fifth Circuit Properly Affirmed the District Court's Dismissal of the Case	21
II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND, IN FACT, THE CIRCUITS ARE UNIFORM IN THEIR RULINGS ON THIS ISSUE	23

III. THE FIFTH CIRCUIT'S REASONING WILL PROMOTE, NOT UNDERMINE, OPERATION OF THE RAILWAY LABOR ACT 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page

Air Line Pilots Association v. Eastern Air Lines, Inc., 869 F.2d 1518 (D.C. Cir. 1989) 8,9

American Railway & Airway Supervisors Association v. Soo Line Railroad, 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3615 (U.S. Mar. 27, 1990) (No. 89-1435) 18

Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972) 3,8,22,26

AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643 (1986) 8

Beeler v. Chicago, Rock Island & Pacific Railway, 169 F.2d 557 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949) 14

Brotherhood of Railway, Airline & Steamship Clerks v. Atchison, Topeka & Santa Fe Railway, 847 F.2d 403 (7th Cir. 1988) 19,23,24,26

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway, 768 F.2d 914 (7th Cir. 1985) 25

Brotherhood of Locomotive Firemen & Enginemen v. Southern Pacific Co., 447 F.2d 1127 (5th Cir. 1971) 9

Burlington Northern, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks, Spec. Bd. Adj. Award No. 16 (1975) 11,16,26,27

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 14

Chambers v. Burlington Northern, Inc., 692 F.2d 109 (10th Cir. 1982) 25

Clausen v. Burlington Northern, Inc., 106 L.R.R.M. (BNA) 2496 (D. Mont. 1980) 25

Consolidated Rail Corp. v. Railway Labor Executives' Association, 109 S. Ct. 2477 (1989) 6,8,19,20,21,22

Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711 (1945) 7,8,14

Table of Authorities Continued

Page

International Association of Machinists v. Illinois Central Gulf Railroad, 120 L.R.R.M. (BNA) 2629 (S.D. Ill. 1984) 25

International Association of Machinists v. Soo Line Railroad, 850 F.2d 368 (8th Cir. 1988)(en banc), *cert. denied*, 109 S. Ct. 1118 (1989) 18,24,25,26

J. I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944) 13,14,26

Johns v. Baltimore & Ohio Railroad, 118 F. Supp. 317 (N.D. Ill.)(3-judge court), *aff'd*, 347 U.S. 964 (1954) 27

Jos. Schlitz Brewing Co., 175 N.L.R.B. 141 (1969) 20

Knighten v. Commissioner of Internal Revenue, 702 F.2d 59 (5th Cir.), *cert. denied*, 464 U.S. 897 (1983) 21

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678 (1944) 15,16

Metropolitan Edison Co. v. National Labor Relations Board, 460 U.S. 693 (1983) 17

National Labor Relations Board v. Magnavox Co., 415 U.S. 322 (1974) 17

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) .. 10,11,14,18,26,27

Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 22

Radioear Corp., 199 N.L.R.B. 1161 (1972) 20

Railway Express Agency, Inc. v. Order of Railroad Telegraphers, 137 F.2d 46 (5th Cir. 1943) 10

Railway Labor Executives' Association v. Consolidated Rail Corp., 884 F.2d 1385 (3d Cir. 1989) 22

Table of Authorities Continued

	Page
Railway Labor Executives Association v. Norfolk & Western Railway, 833 F.2d 700 (7th Cir. 1987)	8
St. Louis Southwestern Railway v. United Transportation Union, 646 F.2d 230 (5th Cir. 1981)	8
Singleton v. Wulff, 428 U.S. 106 (1976)	21
Slocum v. Delaware, Lackawanna & Western Railroad, 339 U.S. 239 (1950)	8
System Federation No. 69 v. Florida East Coast Railway, N.R.A.B. Award No. 4733 (2d Div. 1965)	11,16,26,27
System Federation No. 2 v. Missouri Pacific Railroad, N.R.A.B. Award No. 1579 (2d Div. 1952)	11,16,26,27
Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989)	16
Transportation-Communication Employees v. Grand Trunk Western Railroad, 679 F. Supp. 696 (E.D. Mich. 1988)	25
Union Pacific Railroad v. Sheehan, 439 U.S. 89 (1978)	23,26
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	9
Virginian Railway v. System Federation, 300 U.S. 515 (1937)	12,13,26
FEDERAL STATUTES:	
National Labor Relations Act, 29 U.S.C. § 151, *et seq.*	6,13,15,16,20
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	*passim*
Section 2, 45 U.S.C. § 152	7
Section 2 First, 45 U.S.C. § 152 First	4

Table of Authorities Continued

	Page
Section 2 Second, 45 U.S.C. § 152 Second	4
Section 2 Third, 45 U.S.C. § 152 Third	4
Section 2 Fourth, 45 U.S.C. § 152 Fourth	4
Section 2 Seventh, 45 U.S.C. § 152 Seventh	4
Section 2 Ninth, 45 U.S.C. § 152 Ninth	4,12
Section 3, 45 U.S.C. § 153	8
Section 4, 45 U.S.C. § 154	7
Section 5, 45 U.S.C. § 155	7
Section 6, 45 U.S.C. § 156	4,7,18,20
Section 9 Eighth, 45 U.S.C. § 159 Eighth	14
FEDERAL RULES:	
Sup. Ct. R. 29.1	ii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-17

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF TCU), *et al.*,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), respectfully submits that this case does not present any issue worthy of review by this Court and that the petition for a writ of certiorari should be denied.

The dispute between the parties turns on conflicting interpretations of a collective bargaining agreement, including the parties' past practices and the common law of the shop and the railroad industry. The issue presented to the Court is which tribunal—a court or an expert arbitration board—has jurisdiction to determine whether Santa Fe's voluntary resignation

program, whereby employees are merely given the option of resigning in exchange for a lump sum payment, is authorized by the parties' collective agreement.

In deciding that jurisdiction lies with the arbitration board and not the courts, the Fifth Circuit Court of Appeals correctly applied well-settled law regarding disputes between carriers and unions subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). The Fifth Circuit recognized that if Santa Fe is correct in its interpretation of the collective agreement—*i.e.*, that the agreement, as established by past practice, authorizes Santa Fe's actions—then Santa Fe did not deal directly with its employees in violation of the RLA, but rather acted in conformity with the agreement. Although the Petitioner-Unions ("Unions") disagree with Santa Fe's contract interpretation, substantial precedent from this Court, the lower courts and even boards of arbitration supports the Fifth Circuit's ruling, based on the "minor dispute" principles of the RLA. Indeed, the Fifth Circuit's decision does not conflict with any other circuit court decision, and, in fact, it is entirely consistent with Supreme Court precedent and the two other appellate decisions that have addressed this issue.

Furthermore, this case turns on unique facts, such as the meaning of the past practices and course of dealing between Santa Fe and the Unions under their collective bargaining agreement. The case law reflects that RLA disputes over voluntary resignation programs are best suited for a case-by-case resolution. Accordingly, the Fifth Circuit's decision has no significance or policy import beyond the particular facts and parties in this case.

STATEMENT OF THE CASE

A. Statement of Facts.

Santa Fe is an interstate carrier subject to the RLA; the Unions are the exclusive bargaining representatives of Santa Fe's shop craft employees. Pet. 1a.[1] Santa Fe and the Unions are each signatory to the 1964 Shop Crafts Agreement ("Agreement"), which provides protective benefits for employees who are involuntarily deprived of employment or placed in a worse position as a result of certain operational changes, including "transfers of work." Pet. 5a-6a. The Agreement (art. I § 3) recognizes that employees may resign and denies protective benefits to an employee upon "his resignation." Pet. 12a n.11. In accordance with the RLA, article VI § 1 of the Agreement creates a Shop Craft Special Board of Adjustment with exclusive authority to resolve disputes arising under the Agreement.[2]

During the last four months of 1987, Santa Fe furloughed a number of shop craft employees at its Cleburne, Texas facility. Pet. 2a. On December 21, 1987, Santa Fe posted a notice at its Cleburne facility, offering certain shop craft employees, including those on furlough, an opportunity to resign voluntarily in

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[1] The Fifth Circuit's opinion is reported at 894 F.2d 1463. It is reproduced as Appendix A to the Petition for a Writ of Certiorari. References in this brief to the Fifth Circuit's decision are cited to the pages in Appendix A.

[2] Even if the Agreement did not provide for arbitration, the parties would be required to arbitrate any disputes under the Agreement in accordance with the mandatory arbitration provisions of the RLA. *See Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

return for $20,000.00. *Id.* Over 200 Cleburne employees accepted the offer. *Id.*

B. Course of Proceedings.

On January 12, 1988, six of Santa Fe's shop craft unions filed suit in federal district court, seeking a declaratory judgment and injunctive relief over Santa Fe's voluntary resignation program. Pet. 2a. In the one cause of action pursued on appeal, the Unions contended that in offering the resignation program, Santa Fe violated RLA §§ 2 First, Second, Third, Fourth, and Ninth (45 U.S.C. §§ 152 First, Second, Third, Fourth, Ninth) by dealing directly with its Cleburne shop employees rather than through their designated representatives.[3] Pet. 2a.

In the district court, Santa Fe presented evidence of an established past practice of offering shop craft employees compensation in return for their voluntary resignations, without the express prior approval of the Unions. Pet. 12a-13a & n.12. This evidence included previous voluntary resignation offerings in January of 1984 and in January, May and August of 1987, as well as compensated resignations worked out with employees on an individual basis. Pet. 12a & n.12.

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[3] The Unions asserted two additional causes of action in the district court: (1) that Santa Fe violated the Agreement by allegedly transferring work from its Cleburne shop to shops in other states and by offering employees the voluntary resignation program and (2) that Santa Fe's resignation program constituted a unilateral change in the rates of pay, rules, and working conditions of the Cleburne shop employees, and thus violated RLA §§ 2 Seventh and 6 (45 U.S.C. §§ 152 Seventh, 156). The Unions did not appeal the judgment in Santa Fe's favor on these causes of action.

On October 26, 1988, the district court dismissed the Unions' complaint for lack of jurisdiction because the parties' disagreement constituted a minor dispute subject to mandatory arbitration under the RLA. Pet. 2a. The court looked to past practice evidence of voluntary, compensated resignations and concluded that Santa Fe's claim that the voluntary resignation program was consistent with a mutually understood course of dealing between the parties was nonfrivolous; thus the dispute was minor and within the exclusive jurisdiction of the arbitration board. Pet. 2a, 12a-13a.

On February 28, 1990, the Fifth Circuit affirmed the district court's judgment. The court held that Santa Fe's claims that the voluntary resignation program was contractually authorized by the parties' past practices has an arguable basis sufficient to render this a minor dispute subject to mandatory arbitration under the RLA. Pet. 12a-13a. The Unions' assertion that they could not have contractually permitted the resignation program because they are not authorized to waive the statutory right against direct dealing was rejected by the Fifth Circuit as being contrary to a body of case law that permits unions to waive statutory rights under the RLA. Pet. 5a n.5.

The Fifth Circuit also rejected the Unions' argument that the dispute in this case is neither a major nor a minor dispute, but a direct statutory violation of the RLA's direct dealing prohibition. Pet. 8a-9a. The court recognized that if Santa Fe is correct that the voluntary resignation program is permitted under its collective agreement with the Unions, then there has been no violation of the RLA. *Id.* Thus, resolution of the dispute turns on interpretation of the collective

agreement between the parties, which constitutes a minor dispute. *Id.*

Finally, the court rejected the Unions' argument that where an alleged contractual provision involves waiver of a statutory right, a higher level of scrutiny, *i.e.*, "clear and explicit" rather than "arguable," should be applied in determining whether a dispute is minor. Pet. 10a. The court relied on *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), in which this Court rejected a similar suggestion. Pet. 10a-11a. The Fifth Circuit noted that the "clear and explicit" waiver test urged by the Unions is a test for determining actual substantive contractual questions under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"), and not a test for determining the preliminary question of what body has jurisdiction to address the underlying contractual dispute under the RLA. Pet. 11a n.9.

REASONS FOR DENYING THE WRIT

The Unions' articulated reasons for seeking certiorari do not fit within any of the recognized grounds for invocation of this Court's discretionary jurisdiction. The Fifth Circuit applied settled case law to the facts of this case and properly held that this case presents a minor dispute subject to mandatory arbitration under the RLA and the parties' collective agreement. Its decision does not conflict with any other court of appeals' decision, nor with any decision of this Court. Moreover, it turns on facts which are unique and, as reflected in the case law, are best suited for case-by-case resolution. Since this case was properly decided and does not fit any of the accepted

standards for granting Supreme Court review, the petition for certiorari should be denied.

I. THE FIFTH CIRCUIT'S DECISION IS IN CONFORMITY WITH WELL-ESTABLISHED SUPREME COURT PRECEDENT.

The gist of the Unions' argument is that the Fifth Circuit erred in holding that the district court did not have jurisdiction over their direct dealing cause of action because that claim alleged a violation of the RLA. As shown below, the Unions' direct dealing claim is merely a component part of the overall dispute between the parties regarding Santa Fe's voluntary resignation program and the propriety of that program under the collective agreement. As such, the entire matter, including the direct dealing claim, constitutes an arbitrable minor dispute.

A. The Fifth Circuit Correctly Held That This Case Involves a Minor Dispute Under the Railway Labor Act.

The Fifth Circuit recognized that the RLA provides two distinct procedures to promote the orderly resolution of labor disputes in the railroad industry. Pet. 7a-8a. In the case of a so-called "major dispute"—relating to disputes over the formation of collective agreements or efforts to secure them—before resorting to self-help, the parties are required to submit to conference and, if necessary, mediation in an effort to reach agreement over the matter in controversy. 45 U.S.C. §§ 152, 154-56. *See Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-25 (1945). Where, however, the dispute is classified as "minor"—relating to the meaning or proper application of a particular contract provision with reference to a specific situation or an omitted case—if not settled informally, it is subject

exclusively to resolution through arbitration. 45 U.S.C. § 153. *See, e.g., Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322 (1972); *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 244-45 (1950); *Burley*, 325 U.S. at 723-25.

The Supreme Court recently placed its imprimatur on the standard applied by the lower courts in distinguishing between major and minor disputes when it held that

> [w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2482 (1989). *See also Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989); *St. Louis S.W. Ry. v. UTU*, 646 F.2d 230, 232-33 (5th Cir. 1981). The lower federal courts have refined the controlling test to the point that "if there is any doubt that a dispute is major or minor, a court will construe the dispute to be minor." *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987). *See also AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 650 (1986) (" '[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of

coverage.' ") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

It is well-established that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers*, 363 U.S. at 581-82. *Accord Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989) ("The presumption in favor of arbitration is particularly strong because a collective bargaining agreement may include not only the terms of the written contract but also the 'common law of a particular industry or of a particular plant . . . .' ") (quoting *United Steelworkers*, 363 U.S. at 579); *Brotherhood of Locomotive Firemen & Enginemen v. Southern Pac. Co.*, 447 F.2d 1127, 1136 (5th Cir. 1971) (questions which turn on "custom and practice . . . are the grist for the decisional mill of the [RLA arbitration boards] created by Congress with primary jurisdiction over such matters").

In the instant case, the Fifth Circuit found that Santa Fe's evidence of past practice created a non-frivolous claim that the resignation program was arguably justified by past practice. Pet. 12a-13a. The court's ruling was supported by substantial evidence of past practice, including previous resignation offerings to craft employees and individually negotiated resignation agreements. Pet. 12a & n.12. The court thus properly held that the dispute presented was minor and subject to the exclusive jurisdiction of the arbitration board.[4] Pet. 8a-9a, 13a.

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[4] The correctness of the court's holding is underscored by the

In an attempt to avoid federal policy mandating arbitration, the Unions (Pet. 8, 14.) argue that the Fifth Circuit erred in holding that the district court had no jurisdiction over their direct dealing claim since they alleged an RLA violation. As they alleged in the court below, the Unions apparently contend that an arbitration board has no jurisdiction over this dispute. The Unions' argument is directly contrary to this Court's decision in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).

In *Telegraphers*, the railroad unilaterally negotiated individual pay rates with certain employees. When the railroad contended that the individual agreements superseded the terms of the collective agreement, the resulting dispute was submitted to the National Railroad Adjustment Board. That Board issued "an award sustaining the claims that the agents were entitled to the compensation provided by the collectively bargained agreement" and also held "that the individual contracts were ineffective." *Id.* at 345. When the railroad did not comply with the arbitration award, the union sued to enforce the award in federal court. The railroad contended that the Adjustment Board lacked jurisdiction and was wrong on the merits. *See* decision below, *Railway Express Agency, Inc. v. Order of R.R. Telegraphers*, 137 F.2d 46, 49 (5th Cir. 1943). The Supreme Court held that the award "was in accord-

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fact that two of the Unions filed grievances contending that the alleged transfer of work from the Cleburne shop to shops in other states violated the Agreement in that Cleburne employees affected by the alleged transfer should be paid protective benefits under the Agreement. One of these grievances, filed by Petitioner Brotherhood of Railway Carmen, specifically complained of the voluntary resignation program challenged in this case.

ance with the law," 321 U.S. at 347, and thus recognized that RLA arbitration boards are competent to decide direct dealing issues.

Thus, strong federal policy and controlling Supreme Court precedent support the propriety of the Fifth Circuit's holding in this case. Significantly, adjustment board awards themselves demonstrate that claims of direct dealing in offering compensated resignation programs are grist for RLA arbitrators. *See* awards cited, *infra*, p. 16, n. 7.

B. The Fifth Circuit Correctly Decided the Claims Regarding Direct Dealing, Waiver and Stay of Proceedings.

The Unions' claims that Santa Fe engaged in statutorily prohibited direct dealing, that the Unions could not waive the employees' statutory rights against direct dealing or, alternatively that such a waiver must be "clear and unmistakable," and that the lower courts should not have dismissed their complaint, but rather should have stayed the proceedings pending arbitration, are without merit. First, contrary to the Unions' assertions, direct dealing over compensated voluntary resignations is permitted under the RLA, as shown by controlling Supreme Court precedent. Second, the Unions' contractual authorization allowing Santa Fe to offer its voluntary resignation program directly to employees does not constitute a waiver of the employees' statutory right to choose their bargaining representative, but is, at most, the relinquishment of the right to bargain over a particular economic subject matter—an action legally within the Unions' power. In addition, this Court has previously rejected a union's claim that a waiver must be "clear and unmistakable." Third, the Unions

did not timely raise, and thus waived, their argument that the court below should have stayed this action. In any event, under the RLA, a court has no jurisdiction over minor disputes, and dismissal, rather than a stay of proceedings, is proper.

1. The RLA Permits a Carrier To Deal Directly with Employees in Compensating Them for Their Voluntary Resignations.

The Unions argue (Pet. 9-14) that an employer cannot deal directly with its employees because such conduct is prohibited by the RLA and Supreme Court precedent. As a result, they assert that the dispute presented in this case is neither major nor minor, but, rather, involves a direct violation of the RLA because the voluntary resignation program constituted "direct dealing" in derogation of the employees' right to be represented exclusively by their chosen collective bargaining representatives. Only through this convoluted analysis are the Unions able to contend that their direct dealing claim can escape arbitration.

In support of their argument, the Unions cite several Supreme Court decisions regarding the right of employees to choose their own bargaining representative and to be exclusively represented by that entity in negotiations with a carrier. Pet. 9-14. Contrary to the Unions' assertions, however, these cases show that direct dealing of the type alleged in this case is permitted under the RLA.

Section 2 Ninth of the RLA (45 U.S.C. § 152 Ninth), provides that a carrier "treat with" its employees' certified bargaining representative. In *Virginian Ry. v. System Fed'n*, 300 U.S. 515 (1937), cited by the

Unions, the Court interpreted this provision as barring a railroad from negotiating with any other representative on a collective basis; however, the Court made clear that the RLA does not prohibit individual contracts that do not establish or change the rights or obligations of employees as a class:

> When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, *but not as precluding such individual contracts as petitioner may elect to make directly with individual employees.*

Id. at 549 (emphasis added).

In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), also cited by the Unions, the Supreme Court reaffirmed the *Virginian Ry.* holding in the context of the NLRA. The Court recognized that individual contracts which do not abolish or diminish an employer's obligations under a collective agreement, and which do not increase those of the employees, are permissible:

> *We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.* But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Id. at 339 (emphasis added). The Court's specific focus on the employer's and employee's freedom to decide

individually whether to engage in the employment relationship, *id.* at 335, confirms the law's special tolerance for voluntary *resignation* agreements, which, rather than waiving a condition of employment while employment continues, merely sever the relationship altogether. Indeed, § 9 Eighth of the RLA (45 U.S.C. § 159 Eighth) specifically guarantees an employee's right to resign unilaterally.

The same day *J. I. Case* was decided, the Court issued its instructive opinion in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), and held that the RLA prohibits those contracts with individual employees that modify the obligations of the employer and employees already set forth in a collective agreement. *Id.* at 347. In *Telegraphers*, the Court sustained an NRAB award which found that individual agreements, which set a rate of pay for certain employees, were invalid because they established a rate of pay that was different from and completely inconsistent with the rate of pay specified in the collective agreement. 321 U.S. at 346-47.[5]

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[5] *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396 (1987) ("*J. I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement."); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 733-34, 736 (1945) ("It would be difficult to believe that Congress intended . . . to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation."); *Beeler v. Chicago, R.I.& P. Ry.*, 169 F.2d 557, 559 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949) (RLA "specifically recognizes the right of an individual employee to confer with management concerning matters of individual in-

In the instant case, the Unions cannot legitimately contend that the voluntary resignation program changes or undermines any collectively bargained rights or obligations. No language in any existing collective agreement restricts or conditions an employee's right to resign or Santa Fe's right to solicit a resignation. The only agreement even implicated in this case is the Shop Crafts Agreement, which indisputably contains no language prohibiting Santa Fe from offering money to employees in exchange for a *voluntary* resignation. Indeed, the Agreement (art. I, § 3) specifically denies to employees who voluntarily resign the benefits otherwise provided by the Agreement:

> An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation and rules governing working conditions in case of *his resignation* . . . . [emphasis added]

Thus, under the express terms of the Agreement, employees who resign do not fall within any class of even potentially protected employees, and they clearly have no right under the Agreement to any of the protective benefits. Santa Fe's resignation program accordingly does not undermine or change the terms of the Agreement.[6] In fact, the resignation program

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terest, and the bargaining representative is not authorized to bind the individual employees on matters outside the scope of the collective interest.").

[6] The Unions' reliance on *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), is also misplaced. In that case, which arose under the NLRA, the employer negotiated with a group of employees rather than the union for a wage increase. The union had not authorized the employer to deal directly with the em-

and alleged direct dealing with employees is supported by and consistent with the common law of the railroad industry as reflected in adjustment board awards.[7]

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ployees. As a result, the employer committed an unfair labor practice when it bypassed the union in negotiations. In contrast, in the instant case, Santa Fe did not bypass the Unions to deal directly with employees, but rather dealt with employees over their resignations pursuant to its claim of contractual authorization from the Unions, as reflected by the parties' agreement, including their past practices. In *Medo*, there was no claim that any contract authorized direct dealing, nor were questions of arbitral jurisdiction involved. *See also Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225, 1233 (1989) ("[T]he NLRA 'cannot be imported wholesale into the railway labor arena.' ").

[7] The RLA's expert arbitration boards have uniformly held that, absent an express labor agreement *prohibition*, the solicitation and consummation of voluntary resignations are entirely permissible. *See System Fed'n No. 69 v. Florida East Coast Ry.*, N.R.A.B. Award No. 4733, at 30 (2d Div. 1965) ("Nowhere in the Agreement or in the Railway Labor Act is there any prohibition forbidding employees from resigning their jobs; nor is there any requirement that resignations must take place with the concurrence of the labor organization. It is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration."); *System Fed'n No. 2 v. Missouri Pac. R.R.*, N.R.A.B. Award No. 1579, at 4 (2d Div. 1952) (Board held that under RLA and parties' agreement employee was free to terminate his employment relationship with carrier, with or without pecuniary consideration and was free to agree, for such consideration, never again to be employed by carrier; Board found nothing in parties' agreement or in RLA that prohibited making of contract between employee and carrier); *Burlington Northern, Inc. v. BRAC*, Spec. Bd. Adj. Award No. 16 (1975) (pursuant to Merger Agreement of Nov. 17, 1967)

2. The Fifth Circuit Properly Rejected the Unions' "Waiver" Arguments.

The Unions (Pet. 14-22) contend that dismissal of their direct dealing claim for lack of jurisdiction is inconsistent with decisions of this Court concerning waivers of statutory rights. They assert that the statutory prohibition against direct dealing cannot be waived by the employees' chosen bargaining representative because it is fundamental to the statute. Pet. 15. The Unions cite *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), for the proposition that " 'a union may bergain [sic] away its member's economic rights, but it may not surrender rights that impair the employees' choice of bargaining representative.' " Pet. 16.

Contrary to the Unions' belief, this labor relations truism actually supports the Fifth Circuit's decision. The Unions confuse the impairment of employees' choice of bargaining representative with a duly-designated bargaining representative's right to forego bargaining on a particular economic subject of bargaining. Santa Fe's argument and the Fifth Circuit's holding, that the Unions, through past practice, have contractually authorized Santa Fe to offer employees a voluntary resignation program, does not compromise the Union's representative status. Rather, this contractual authorization, even if denominated a waiver, was simply a relinquishment of the right to bargain over a particular economic subject matter, which *Magnavox* and *Metropolitan Edison* establish

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(Board, in effect, ruled that mere existence of contract provision permitting one type of employee separation allowance did not bar alternate voluntary resignation program).

was within the Unions' power to do. Significantly, in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)—a case on which the Unions rely extensively—this Court expressly acknowledged that under the RLA a union can "agree[ ] that the company should be free to negotiate with [employees] severally." *Id.* at 347.[8]

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[8] The Unions' effort to create a conflict in the circuits on this issue by relying on *American Ry. & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3615 (U.S. Mar. 27, 1990) (No. 89-1435), is farfetched and unavailing. In that case, the unions sought to require the railroad to bargain only through a national multi-carrier representative, despite the railroad's desire to designate its own representative to bargain over health and welfare issues on a local level. The Eighth Circuit held that the railroad had a statutory right to choose its own representative for bargaining and could not be forced to use the representative required by the union. In the instant case, the employees have designated the Unions as their bargaining representatives. Santa Fe has not attempted to force the employees to bargain through some other representative. Rather, the Unions, the representatives chosen by the employees, have through their past acquiescence given Santa Fe the right to deal directly with employees over resignation issues. If the Unions wish to change the terms of the collective agreement with Santa Fe, they are free to seek bargaining over the issue pursuant to RLA § 6 (45 U.S.C. § 156).

More destructive of the Unions' effort to create a conflict, however, is the fact that the Eighth Circuit, in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989), specifically held that an employee resignation program, like the one considered by the Fifth Circuit in this case, was arguably permitted by the parties' collective bargaining agreement and thus gave rise to a minor dispute, notwithstanding the union's direct dealing claim. The Eighth Circuit thus is in complete agreement with the Fifth Circuit on the very issue presented in this case.

The Unions further contend that even if they could waive the employees' right to bargain over compensated resignations solely through their collective bargaining representative, such a waiver must be "clear and unmistakable," and not merely "arguable." Pet. 18-22. This argument was specifically rejected by this Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2483-84 (1989). The Unions' position, if accepted, would mean that disputes of this nature, where the carrier contends that the contract, past practices and common law of the industry authorize its conduct, would never proceed to arbitration because the court would be required to decide in the first instance whether the contract clearly and unmistakably authorized the carrier's conduct. If the court made that determination, there would be nothing left to arbitrate since the contract interpretation dispute would be decided by the district court. Such a rule would reverse the test for minor disputes and would be totally at odds with the strong policy of the RLA, which relegates matters of contract interpretation (whether they be based on past practices, the common law of the industry or the express terms of the contract) to arbitration. *See, e.g., BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403, 408 (7th Cir. 1988)("[W]hether [past practice] evidence is sufficient to establish an enforceable, contractual obligation is a question solely for the NRAB.").

Moreover, the Fifth Circuit correctly ruled that whether there has been a clear and unmistakable waiver of the right to negotiate over resignation issues is a question more properly addressed to the arbitration board and is not for the court to deter-

mine. Pet. 11a & n.9. The court's role is merely to determine whether there is an arguable basis for Santa Fe's position.[9]

The Unions assert (Pet. 21-22) that *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), considered controlling by the Fifth Circuit, does not apply to the instant case because that case involved a refusal to bargain, while this case allegedly involves direct dealing, and to apply *Consolidated Rail* to this case would be destructive of the statutory scheme.[10] In *Consolidated Rail*, the railroad asserted that a dispute over implementation of drug testing was minor because its past practice of conducting physical examinations of employees, in-

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[9] Santa Fe has never claimed that the Unions have waived the right to bargain over the resignation program. Rather, Santa Fe only asserts that the program is already permitted by contract, including the practices of the shop and industry. Even under the NLRA, from which the Unions purport to borrow their clear and unmistakable waiver theory, that test applies only when an employer contends that the union has contractually given up its statutory right to bargain over some issue. And even then, the NLRB will remit such disputes to arbitration. *E.g., Radioear Corp.*, 199 N.L.R.B. 1161 (1972); *Jos. Schlitz Brewing Co.*, 175 N.L.R.B. 141, 142 (1969). The Unions here have never served a notice under RLA § 6 (45 U.S.C. § 156) to bargain over this subject, but instead seek to eliminate the program by judicial fiat.

[10] The Unions fail to explain why a refusal to bargain is less destructive of the statutory scheme than an employer's attempt to deal directly with employees. An employer's refusal to bargain could be more destructive of the statutory scheme since an employee has the right to refuse to deal directly with his employer and to refer all matters to his union if he so desires, whereas an employee would not be in a position to force his employer to bargain.

cluding drug testing under certain circumstances, arguably gave it the discretion to include drug testing in all physical examinations. The unions argued that it was a major dispute and that drug testing could not be implemented prior to the parties' bargaining over the issue. This Court held that where an employer asserts a contractual right to take a contested action, the dispute is a minor one subject to mandatory arbitration if the action is arguably justified by the terms of the collective agreement. *Id.* at 2482.

The Unions' efforts to distinguish *Consolidated Rail* are disingenuous. The instant case, like *Consolidated Rail*, involves the assertion by an employer, Santa Fe, of a contractual right to take a contested action, *i.e.*, to implement its voluntary resignation program. Thus, this case fits squarely within the *Consolidated Rail* holding.

3. The Fifth Circuit Properly Affirmed the District Court's Dismissal of the Case.

The Unions contend (Pet. 22-25) that even if the dispute in this case is arbitrable, the district court should not have dismissed the case, but rather should have stayed the proceedings during the pendency of the arbitration process. This argument was not raised in the district court and was not asserted on appeal until the Unions filed their reply brief and then only in a footnote. *See* Pet. 7 & n.4. The issue was not addressed by the Fifth Circuit. Under these circumstances, the Unions have waived their stay of proceedings argument. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Knighten v. Commissioner of Internal Revenue*, 702 F.2d 59, 60 n.1 (5th Cir.), *cert. denied*, 464 U.S. 897 (1983).

Even if the Unions had not waived their argument, their reliance on *Consolidated Rail, supra*, and *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946), is wholly unavailing. The Unions quote several passages from the Court's decision in *Consolidated Rail* which they claim support their stay argument: *e.g.*, the court must " '*defer* to arbitration' " when a carrier's claim of contractual authority to make a unilateral change in working conditions is arguably justified, and the effect of that ruling will be to " '*delay* collective bargaining in some cases' " and to " '*delay* [ ] the onset of [the Section 6] process until the Board determines on the merits that the employer's interpretation of the agreement is incorrect. . . .' " Pet. 22 (emphasis in petition). The Unions, however, fail to point out that in *Consolidated Rail* this Court reversed the Third Circuit which had held that the case involved a major dispute within the court's jurisdiction. This Court did not reverse and remand with instructions for the lower court to stay proceedings during the pendency of arbitration. Moreover, on remand the Third Circuit affirmed the order of the district court dismissing the complaint for lack of subject matter jurisdiction. *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, 884 F.2d 1385 (1989).

The Unions' reliance on *Pitney* is similarly unpersuasive. In *Pitney*, the court had supervisory authority over the bankrupt railroad and thus had an independent basis for maintaining jurisdiction during the pendency of arbitration—the Bankruptcy Act. Moreover, *Pitney* was decided prior to the seminal decision in *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972), in which this Court recognized the arbitration boards' exclusive jurisdiction over all minor

disputes and emphasized that the courts are without jurisdiction when a minor dispute is in issue. *See also Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1979). Thus, the Fifth Circuit properly upheld dismissal of the case because the issue presented was a minor dispute over which courts have no jurisdiction.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND, IN FACT, THE CIRCUITS ARE UNIFORM IN THEIR RULINGS ON THIS ISSUE.

At least two other courts of appeals have held that disputes over a railroad's right to implement a resignation program must be arbitrated. In *BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988), the union contended that Santa Fe engaged in unlawful "direct dealing" by unilaterally offering employees a resignation program that was virtually indistinguishable from the one in this case. The district court dismissed BRAC's lawsuit based on evidence of past practice by Santa Fe of offering cash payments in exchange for resignations by BRAC-represented employees on two separate occasions.

The Seventh Circuit affirmed. The court found that "Santa Fe's past-practice evidence was sufficient to support a nonfrivolous claim that buyouts of clerical employees had become an established part of the parties' understanding of their contract." *Id.* at 406. Significantly, the court stated that "whether the [past practice] evidence is sufficient to establish an enforceable, contractual obligation is a question solely for the NRAB." *Id.* at 408.

The Seventh Circuit also held that it could not assert jurisdiction over BRAC's direct dealing claim. The court noted that the federal courts' "jurisdiction

over RLA violations is quite narrow" and that a court should not assert jurisdiction when contractual justification for the action is claimed, because to do so would intrude into the realm of RLA arbitration. *Id.* at 409.

In *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989), the Eighth Circuit held that Soo Line's resignation program raised an arbitrable minor dispute. Soo Line had acquired another railroad and entered into an employee protective agreement with the machinists' union. Thereafter, Soo Line decided to reduce the workforce and offered a voluntary resignation program whereby employees could resign for $15,000.00. *Id.* at 372. IAM sued to enjoin the program. The district court granted an injunction, but was reversed by the Eighth Circuit en banc.

The court considered whether IAM's lawsuit presented a major or minor dispute and held that "the conclusion is inescapable that the dispute is minor." *Id.* at 376. The court articulated the following controlling guidelines:

> In deciding whether a dispute is major or minor, it is not our function to interpret or construe the language of the collectively bargained-for agreements between the parties . . .; rather, our function is to determine whether this case implicates a question of contract interpretation. If the parties disagree whether the dispute can be resolved by reference to an agreement, the dispute is minor unless the claims of contractual justification are "frivolous" or "obviously insubstantial." . . . This rule is a necessary adjunct of

> the need to protect the arbitrator's exclusive jurisdiction over minor disputes and supports the additional corollary that "when in doubt, the courts construe disputes as minor." Thus, in this case, if the bargained-for agreements arguably permit the practice, then the Soo Line may proceed unilaterally, subject to arbitration before the National Railroad Adjustment Board.

Id. at 376-77 (citations omitted) (quoting *Brotherhood of Locomotive Eng'nrs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (7th Cir. 1985)).

In concluding that IAM's challenge to Soo Line's buyout program presented a minor dispute, the Eighth Circuit noted that "[a] number of tribunals have held that the very argument that the Soo Line sets forth here presents a minor dispute." *Id.* at 378. Relying on these cases, the court held that "[i]t is difficult to conceive how a legal position such as the Soo Line's, which has received such widespread judicial acceptance, could be 'frivolous' or 'obviously insubstantial.'" *Id.* at 380. *Accord Transportation-Communication Employees v. Grand Trunk W.R.R.*, 679 F. Supp. 696 (E.D. Mich. 1988); *IAM v. Illinois Cent. Gulf R.R.*, 120 L.R.R.M. (BNA) 2629 (S.D. Ill. 1984). *See also Chambers v. Burlington Northern, Inc.*, 692 F.2d 109, 112 (10th Cir. 1982) (question whether individual transfer agreement superseded right to allowances under merger protection agreement and collective agreement must be arbitrated); *Clausen v. Burlington Northern, Inc.*, 106 L.R.R.M. (BNA) 2496, 2498 (D. Mont. 1980) (controversy whether transfer agreement negotiated between individual employee and railroad violates RLA and merger protection agreement is arbitrable minor dispute).

III. THE FIFTH CIRCUIT'S REASONING WILL PROMOTE, NOT UNDERMINE, OPERATION OF THE RAILWAY LABOR ACT.

The Unions assert (Pet. 25-27) that the Fifth Circuit's decision that this case presents an arbitrable minor dispute will substantially undermine the operation of the RLA. They argue that Santa Fe's offer of the voluntary resignation program subverts the RLA's exclusive representation principle. The Unions, however, ignore the fact that this Court has recognized that a carrier may enter into individual contracts with its employees without violating the RLA. *See Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944); *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 549 (1937). *See also* discussion, *supra*, at 12-16. In addition, they ignore the strong policy favoring arbitration of RLA disputes. *See Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93-94 (1979); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972). *See also* discussion, *supra*, at 7-9. Finally, they ignore the fact that disputes over compensated resignations, such as the one in issue here, have consistently been deemed minor disputes within the exclusive jurisdiction of RLA arbitration boards. *See IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989); *BRAC v. Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988). *See also* adjustment board awards cited, *supra*, at 16 n. 7.

Significantly, the Court's decision in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)—that the National Railroad Adjustment Board had jurisdiction to adjudicate and fashion

remedies in a dispute alleging direct dealing by the railroad with its employees—directly refutes the Unions' claim and supports the Fifth Circuit's reasoning that this dispute must be arbitrated, despite the Unions' assertion of an RLA violation. The *Telegraphers* decision provides proof positive that direct dealing disputes are proper subject matter for RLA arbitration, and it further underscores the fact that arbitration boards do have both the authority and the ability to decide such disputes and to fashion appropriate remedies. Based on the Supreme Court's decision in *Telegraphers* and the adjustment board awards discussed previously in this brief (*supra*, at 16 n. 7), it is clear beyond peradventure that the Unions' direct dealing claim can be arbitrated without upsetting the RLA statutory scheme. Indeed, arbitration would be in perfect harmony with that scheme. *See also Johns v. Baltimore & O.R.R.*, 118 F. Supp. 317, 320-21 (N.D. Ill.) (3-judge court), *aff'd*, 347 U.S. 964 (1954) (per curiam).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: August 31, 1990

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF T.C.U.), *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. UNDER LONGSTANDING PRECEDENT OF THIS COURT, THE DISTRICT COURT HAD JURISDICTION OF THE UNIONS' CHALLENGE TO SANTA FE'S EMPLOYEE BUY-OUT PROGRAM 1

II. SANTA FE'S ASSERTION OF A CONTRACTUAL WAIVER OF THE PROHIBITION AGAINST DIRECT DEALING DID NOT DIVEST THE DISTRICT COURT OF JURISDICTION OF THE UNIONS' COMPLAINT.... 4

A. *Conrail* Does Not Support The Court of Appeals' Conclusion That Santa Fe's Contract Claim Required Arbitration of the Unions' Complaint 4

B. Santa Fe Has Not Refuted The Unions' Assertion That The Court Of Appeals' Decision Conflicts With Precedent Of This Court Concerning Waivers Of Statutory Rights.... 6

C. Santa Fe Has Not Demonstrated That The Fifth Circuit Properly Affirmed The District Court's Dismissal Of The Unions' Complaint 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES RELIED UPON: Page

American Ry. & Airway Supervisors Ass'n v. Soo Line R.R., 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, (No. 89-1435) 7
A.T.&T. Technologies v. Communications Workers of America, 475 U.S. 643 (1976) 8
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) .. 3
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 9
Consolidated Rail Corp. v. Railway Labor Executives' Association, 491 U.S. ——, 105 L. Ed. 2d 250 (1989) ..... *passim*
J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 2, 7
Jos. Schlitz Brewing Co., 175 NLRB 141 (1968) .. 8
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1955) 6
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 2, 4
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 6
NLRB v. C&C Plywood Co., 385 U.S. 421 (1967) .. 5-6, 9
NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 6
NLRB v. Jones & Laughlin, 301 U.S. 1 (1936) .. 2
NLRB v. Magnavox Co., 415 U.S. 322 (1974) 6, 7
NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116 (1971) 6, 8
Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 9, 10
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 2, 4
Radioear Corp., 199 NLRB 1161 (1972) 8
Road Sprinkler Fitters v. NLRB, 676 F.2d 826 (D.C. Cir. 1982) 8
Road Sprinkler Fitters v. NLRB, 600 F.2d 918 (D.C. Cir. 1979) 8
Texas & N.O.R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930) 1-2
Toledo Typographical Union No. 63 v. National Labor Relations Board, 906 F.2d 1220 (D.C. Cir. 1990) 4, 6, 7

TABLE OF AUTHORITIES—Continued

Page

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 8
United Technologies Corp., 268 NLRB No. 83 (1984) 8
Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937) 2

STATUTES RELIED UPON

National Labor Relations Act, 29 U.S.C. 151, *et seq.* 1, 3, 6, 8
Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ..... *passim*
Section 2 Third, 45 U.S.C. § 152 Third 1, 7
Section 2 Fourth, 45 U.S.C. § 152 Fourth 1
Section 2 Eighth, 45 U.S.C. § 152 Eighth 7
Section 2 Ninth, 45 U.S.C. § 152 Ninth 1

REPLY BRIEF FOR PETITIONERS

In opposition to the petition, respondent Atchison Topeka & Santa Fe Ry Co. ("Santa Fe") asserts that the courts below properly held that a rail carrier's assertion that an implied agreement exists which arguably can be interpreted as waiving the statutory prohibition against carrier direct dealing with union-represented employees (45 U.S.C. §§ 152 Third, Fourth and Ninth) divests a district court of jurisdiction to enforce that prohibition. Brief in Opposition at 7-11, 23-25, *citing*, *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 105 L. Ed. 2d 250 (1989) ("*Conrail*"). *Santa Fe* further contends that the Unions' challenge to Santa Fe's implementation of a program which solicited employee resignations in return for their relinquishment of all rights under collective bargaining agreements, did not state a claim under the RLA. Brief in Opposition at 12-16. The petitioning rail labor unions (Unions") respectfully submit this brief in response to those contentions.

I. UNDER LONGSTANDING PRECEDENT OF THIS COURT, THE DISTRICT COURT HAD JURISDICTION OF THE UNIONS' CHALLENGE TO SANTA FE'S EMPLOYEE BUYOUT PROGRAM

Under both the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et al.*, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, this Court has held that the prohibition against employer direct dealing with union-represented employees is so fundamental to Federal labor policies that such conduct is necessarily violative of those statutes; and that, in RLA cases, district court enforcement of the prohibition against direct dealing is essential to the ability of employees to exercise the rights provided in the statute. *See Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship*

Clerks, 281 U.S. 548, 569 (1930); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937); *J.I. Case v. NLRB*, 321 U.S. 342 (1944); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944). Santa Fe has cited passages in several of these decisions as holding that "direct dealing of the type alleged in this case is permitted under the RLA." Brief in Opposition at 12. This contention is at odds with the entire thrust of these decisions; it also finds no support in the passages of those decisions cited by Santa Fe.

In *Virginian Ry.*, the Court stated that the RLA did not "preclud[e] such individual contracts as petitioner may elect to make directly with individual employees" (300 U.S. at 549), however, that statement was directed to the carrier's objection that it was being prohibited from entering into "contracts of employment" with individual employees. *Id.* at 548. The Court stated that the statute did not prohibit bargaining with individuals when *no* bargaining agent has been designated, and that a carrier would not be compelled to enter into any hiring agreement and could enter into individual contracts of hiring.[1]

In *J.I. Case* the Court held that individual contracts are "subsidiary to the terms of the trade agreement" and an individual employee may not "waive any of its benefits", even if on his own he would yield to less favorable terms." 321 U.S. at 336. In *J.I. Case*, the Court did state that an employee could enter into an agreement which is not inconsistent with the collective bargaining

[1] The passage of the decision cited by Santa Fe is in the Court's discussion of part of the United States' brief stating the position ultimately adopted by the court. (300 U.S. at 548-49). *See also NLRB v Jones & Laughlin*, 301 U.S. 1, 45 (1936), and *J.I. Case: Virginian Ry.* and *NLRB v. Jones & Laughlin* recognized "some scope for individual contracts but it did not undertake to define it or consider the relations between lawful individual and collective agreements, which is the problem before us now." 321 U.S. at 336.

agreement (*Id.* at 339), but that immediately followed the Court's statement that individual contracts may deal with matters not "within the stautory scope of collective bargaining." *Id.* Obviously, the Court's recognition of the ability of employers and individual employees to bargain over matters which are not subject to collective bargaining does not mean that direct dealing with individual employees over *bargainable matters* is permissible.[2]

In *Order of Railroad Telegraphers*, the Court did sustain an arbitration award which held that employees were entitled to a collectively bargained rate of pay rather than their individually bargained rate of pay. However, *Order of Railroad Telegraphers* concerned two issues: the contractual rights of the individual employees, and the statutory obligations of the employer. The Court held that the individuals were entitled to the collectively bargained rate of pay *and* that the employer's conduct violated the RLA. 321 U.S. at 346-348. The fact that individuals can enforce their collectively bargained rights through arbitration despite an unlawful individual contract does not mean that they, all of their co-workers and their Union can, or must, seek enforcement of the statutory prohibition against direct dealing in arbitration. Indeed, the Court specifically recognized the distinct nature of the two aspects of the direct dealing problem in its decision in *Order of Railroad Telegraphers*.

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[2] Santa Fe's reliance on *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) is similarly unavailing. Although the Court observed that "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by the collective bargaining agreement" (482 U.S. at 396), the contracts at issue there were negotiated by employees when they were managers not covered by the collective agreement. Moreover, the Court held only that the NLRA did not convert an action on those contracts into a Federal cause of action; and it specifically noted that the employer could still assert in state court that the individual agreements were invalid under the NLRA.

Any doubt as to the scope of the prohibition against direct dealing was resolved in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), in which the Court stated: "[b]argaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained. . . ." *Id.* at 684. Furthermore the Court stated that the employer in *Medo Photo* was not relieved of its obligations to negotiate only with the union, even when its employees asked that those obligations be disregarded, because "[t]he statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer even though the employees consent." *Id.* at 687. *See also Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990).

Accordingly, under well-established precedent of this Court, the Unions' complaint clearly asserted a claim within the jurisdiction of the district court to enforce the RLA.

II. SANTA FE'S ASSERTION OF A CONTRACTUAL WAIVER OF THE PROHIBITION AGAINST DIRECT DEALING DID NOT DIVEST THE DISTRICT COURT OF JURISDICTION OF THE UNIONS' COMPLAINT

A. *Conrail* Does Not Support The Court of Appeals' Conclusion That Santa Fe's Contract Claim Required Arbitration of the Unions' Complaint

Conrail does not control this case, nor does it support the court of appeals' decision, because this case presents a question left unanswered in *Conrail*: What is the effect of a carrier's asserted contractual defense to an RLA complaint when a union denies the existence of the alleged contract? 105 L.Ed 2d at 267.n.9.

In *Conrail*, both parties recognized the existence of an implied agreement concerning return-to-duty physical

examinations of employees. The unions asserted that Conrail "departed materially from the parties agreement" in adding urinalysis drug testing to the physical examinations, so Conrail's actions constituted a change in working conditions without prior bargaining; Conrail argued that the agreement regarding physical examinations arguably permitted its actions so the dispute was over contract interpretation and therefore subject to arbitration. *Id.* 267-70. Because the Court concluded that "the parties agreed that Conrail's power to conduct physical examinations is an implied contractual term," it stated that although "the parties take different views of how a court is to determine whether a past practice has risen to the level of an implied contractual term," it did not have to decide that question. 105 L. Ed. 2d at 267 n.9.

This case differs significantly from *Conrail* because here the Unions have strenuously denied the existence of *any* agreement waiving the prohibition against direct dealing. The question presented by Santa Fe's claim of contractual waiver is not whether an existing agreement can be interpreted as permitting Santa Fe's actions, but rather whether the alleged agreement even exists. The Unions submit that such questions must be resolved by courts, not by arbitrators; *Conrail*, therefore does not support the conclusion that Santa Fe's claim of waiver divested the district court of jurisdiction of the Unions' complaint. Indeed, this Court's discussion of the differences between the Unions and Conrail as to "how a *court* is to determine whether a particular past practice has risen to the level of an implied contractual term" (*id.*, emphasis added), indicates that when the parties dispute whether a contract exists, that question is to be resolved by the district court, not an arbitrator.[3]

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[3] This result is consistent with NLRA precedent that it is proper for the NLRB to construe a contract in an unfair labor practice case, even when the parties' dispute involves different interpretations of the contract. *NLRB v. C&C Plywood Co.*, 385 U.S. 421,

A second significant difference between this case and *Conrail* is that this case concerns a fundamental command of the statute which is necessary to its effective operation. As the Court of Appeals for the District of Columbia Circuit has observed, in a case under the NLRA, an agreement permitting direct dealing "would substantially modif[y] the collective-bargaining system provided for in the statute by weakening the independence of the 'representative chosen by the employees,'" *Toledo Typographical Union, supra,* 907 F.2d at 1224 (citation omitted). Moreover, that court stated (*id.*) that direct dealing over employee buyouts:

> is particularly offensive to the principle of collective bargaining because it would put the Employer in a position to exert a highly divisive force among the members of the bargaining unit. By negotiating directly with employees in an attempt to buy out some number of lifetime job guarantees at the lowest cost, the Employer could effectively put the employees into competition with each other to sell out at the lowest price.

B. Santa Fe Has Not Refuted The Unions' Assertion That The Court Of Appeals' Decision Conflicts With Precedent Of This Court Concerning Waivers Of Statutory Rights

Santa Fe has attempted to refute the Unions' reliance upon this Court's decisions in *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1955), *NLRB v. Magnavox Co.,* 415 U.S. 322 (1974) and *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983), by asserting that the instant case involves "simply a relinquishment of the right to bargain over a particular economic subject matter which *Magnavox* and *Metropolitan Edison* establish was within the Unions' power to do." Brief in Opposition at

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428 (1967), *NLRB v. Great Dane Trailers Inc.,* 388 U.S. 26, 31 n.7 (1967). *See also NLRB v. Plasterers Union No. 79,* 404 U.S. 116, 136-37 (1971).

17-18. However, this case does not concern merely an economic term of employment, but rather the fundamental right of employees to engage in collective bargaining. Santa Fe's contention is not merely that the Unions waived bargaining over the terms of employee resignations, but that the Unions recognized that there would be bargaining over such terms and agreed that employees would have to engage in such bargaining individually; a result directly contrary to the entire purpose of the statute.

Moreover, Santa Fe has ignored this Court's recognition in *Magnavox* (415 U.S. at 325-26), that representation rights inhere in individual employees and are so fundamental to operation of the Act that they may not be waived. In this case, the Cleburne shop employees were entitled to enforcement of their statutorily protected decision to consolidate their bargaining power and to avoid the destructive competiveness of individual bargaining (*J.I. Case*, 321 U.S. at 336, *Toledo Typographical Union*, 907 F.2d at 1224). When the statutory right at issue here is properly perceived, it is apparent that this case resembles the situation in *Magnavox* where it was held that the right to distribute union literature was essential to the right of self-organization and selection of a bargaining representative and that it was not subject to waiver. 415 U.S. at 325-26. Additionally, although Santa Fe has attempted (Brief in Opposition at 18 n.8) to distinguish this case on its facts from *American Ry. & Airway Supervisors Ass'n*, 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, (No. 89-1435), Santa Fe has not explained why a rail carrier's rights under Section 2 Third cannot be waived (*id.* at 679), but employee rights under Section 2 Third may be waived.[4]

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[4] Santa Fe has also failed to address the Unions' argument (Petition at 16-17) that such rights may not be waived under the RLA since Section 2 Eighth (45 U.S.C. § 152 Eighth) incorporates those rights in all RLA agreements.

Even if the prohibition against direct dealing may be waived, Santa Fe has not demonstrated that the "clear and unmistakable waiver" test should not apply. Santa Fe asserts that this NLRA doctrine is inapplicable because the RLA requires arbitration of merely arguable contract claims (Brief in Opposition at 19, citing *Conrail*), but *Conrail* did not consider the clear and unmistakable waiver test. Furthermore, NLRA precedent has similarly developed an equally strong requirement of arbitration of contract interpretation disputes. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-78 (1960); *A.T. & T. Technologies v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986). Moreover, when the NLRB does defer to arbitration when a contractual defense is asserted in an unfair labor practice case, it retains jurisdiction and will consider the issue *de novo* if the award is inconsistent with the statute. *NLRB v. Plasterer's Union No. 79*, 404 U.S. 116, 136-37 (1971); *United Technologies Corp.*, 268 NLRB No. 83 (1984).[5]

C. Santa Fe Has Not Demonstrated That The Fifth Circuit Properly Affirmed The District Court's Dismissal Of The Unions' Complaint

Santa Fe has asserted that the *Conrail* decision did not require that the district court just defer the contract claim to arbitration and retain jurisdiction of the Unions' complaint, because in *Conrail*, this Court "did not reverse and remand with instructions for the lower

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[5] Santa Fe's reliance upon the NLRB's decisions in *Radioear Corp.*, 199 NLRB 1161 (1972) and *Jos. Schlitz Brewing Co.*, 175 NLRB 141 (1969) (Brief in Opposition at 20 n.9), is unavailing because both of those cases involved allegations of unilateral changes in working conditions, not violations of basic representation rights. And the *Radioear* decision was criticized by the D.C. Circuit in a similar case because the Board did not apply the clear and unmistakable waiver test. *Road Sprinkler Fitters v. NLRB*, 600 F.2d 918, 922-23 (D.C. Cir. 1979); *Road Sprinkler Fitters v. NLRB*, 676 F.2d 826, 829, 833 (D.C. Cir. 1982).

court to stay proceedings during the pendency of arbitration." Brief in Opposition at 22.[6] However, the absence of such an order does not undercut the clear holding that a district court should "defer" to arbitration and that the other statutory processes of the Act would be "delayed". 105 L. Ed. 2d at 266. Moreover, in that case, the Court assumed that if the Unions prevailed in arbitration, any injuries to employees could be remedied by an arbitral back pay order, and that the possibility of additional back pay orders as well as collective bargaining, could address prospective problems. 105 L. Ed. 2d at 266 n.8

In the instant case, adjudication of the statutory rights involved would require a determination of whether Santa Fe violated the prohibition against direct dealing and, if a violation was found, issuance of an order enjoining such violations in the future. If Santa Fe's claim was placed before an arbitrator, who rejected Santa Fe's interpretation of the alleged contract, the arbitrator might provide back pay to individual employees. However, the arbitrator could not decide the statutory issues, or fully remedy the statutory violation, nor could he provide the appropriate statutory relief, including injunctive relief. *C & C Plywood*, 385 U.S. at 429 n.15. In that event, the failure of the district court to retain jurisdiction would mean that the Unions would have no ability to vindicate the statutory rights of Santa Fe's employees.

Santa Fe's attempt to distinguish *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 568 (1946), because

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[6] Santa Fe's contention that the Unions' deferral argument is not properly before the Court because it was not raised until the Unions filed their reply brief in the court of appeals (Brief in Opposition at 21) is without force. The deferral argument was based upon this Court's decision in *Conrail* which was issued just four days before the Unions filed their reply brief. However, under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), once this Court issued its decision, the court below was required to retain jurisdiction pending arbitration.

that case involved the district court's bankruptcy jurisdiction as well as its RLA jurisdiction (Brief in Opposition at 22), is unavailing. The Court concluded that resolution of the RLA issue required the interpretation of a collective bargaining agreement, so the district court should have *stayed* the dismissal of the complaint pending the results of arbitration. 326 U.S. at 567-68. Thus, the Court's discussion of the stay of district court proceedings pending arbitration was in its holding regarding the district court's RLA jurisdiction, not its bankruptcy jurisdiction.

Accordingly, even if Santa Fe's claim of contractual waiver required arbitration, dismissal of the Unions' complaint was contrary to this Court's decisions in *Conrail* and *Pitney*.

CONCLUSION

The Court should grant the writ sought by petitioners and review and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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